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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 1281

WALTER F. TELLIER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER F. TELLIER, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 6, 1958.

OPINIONS BELOW

The opinion and dissenting opinion in the court below (Appendix A, *infra,* pp. A1-A24) have not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra,* pp. A25-A26), was entered on May 6, 1958. A

petition for rehearing and for rehearing en banc was denied on May 28, 1958 (Appendix B, *infra*, p. A26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney, by the act of orally warning his client against imprudent and unlawful action, is placing himself in the position of becoming over objection the principal witness against the client whom he had warned, simply because, after the warning, he sends the client a letter for transmission to others that effectively waters down and in significant aspects does not repeat what he told his client orally.

2. Whether a privileged private conversation between attorney and client ceases to be privileged because, after the conversation, the attorney sends the client a letter for transmission to others that relates to the general subject matter of the conversation, but in greatly subdued and substantially different terms.

3. Whether books and records of a corporation, not shown to have been kept in the regular course of business as explicitly required by 28 U.S.C. § 1732(a), are admissible against one who was neither an officer, nor a director, nor in control, of the corporation.

STATUTE AND RULE OF COURT INVOLVED

1. Rule 26 of the Federal Rules of Criminal Procedure is as follows:

> **"Rule 26. Evidence**
>
> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency

and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

2. Section 1732(a) of Title 28, U. S. Code, as amended, is as follows:

"§ 1732. Record made in regular course of business; photographic copies

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

STATEMENT

In view of the limited number of issues presented in this petition, there are set forth below only sufficient facts to place those issues in their proper setting.

Preliminary Summary. Alaska Telephone Corporation (hereinafter A.T.C.), an Alaska corporation that owned telephone exchanges and power plants in the Territory Alaska, needed funds for various corporate purposes. Petitioner acted as underwriter in selling to the public, at various times between September 1951 and the spring of 1955, four separate series of the corporation's convertible debentures. The present charges grow out of the sale of these debentures.

Petitioner was indicted in a 36 count indictment (644a-686a) * originally filed on December 1, 1955 (1a). Eighteen counts (Nos. 1, 3, 5, 7, 9, 11, 13, 15, 16, 19, 20, 22, 24, 28, 30, 32, 34, 35) separately charged a violation of Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)). Seventeen other counts alleged mail frauds in violation of 18 U.S.C. § 1341. The last count (No. 36) alleged a conspiracy to violate both statutes, contrary to 18 U.S.C. § 371.

Petitioner was found guilty by a jury on all counts (624a), and was sentenced to four and a half years' imprisonment and to pay a total fine of $18,000 (687a-688a). On appeal to the court below, the judgment was affirmed (Appendix A, *infra,* pp. A1-A19), Judge Lumbard voting to reverse petitioner's conviction because the trial court permitted the Government's witness Cahn, an attorney, to testify to a confidential con-

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* References to figures with the suffix "a" are to the printed Appendix filed in the court below by petitioner and his co-appellant Proctor. References to the transcript of testimony, filed here in unprinted form pursuant to Rule 21(3), are prefaced by "Tr." The Appendix filed by the United States below, which included no testimony and contained 64 exhibits, 35 of which duplicated exhibits already set forth in full in petitioner's Appendix, is not separately referred to in the present Petition.

versation he had with the petitioner, who was then his client (*infra*, pp. A19-A24).

Two individuals, Elton B. Jones and Albert J. Proctor, were named as co-defendants with petitioner, and were likewise convicted on all counts (624a). Both were given much more lenient sentences, which were suspended (3a; 634a-636a; 688a-689a). Jones did not appeal; Proctor appealed, the judgment against him was also affirmed, though without dissent (*infra*, pp. A1-A24); he has not joined in the present petition.

Also indicted with the three individual defendants was the corporation, A.T.C. (644a), which was put on trial, although it never appeared and was unrepresented by counsel (1a-2a; 5a-8a). No verdict was ever found against A.T.C. (3a, 624a), but it was none the less sentenced and fined, on the trial court's theory (4a) "that verdict against Defts. Jones and Proctor may be treated as a verdict against Corporation."

The judgment that petitioner asks this Court to review was entered at the second trial of all defendants. The first trial resulted in a disagreement of the jury (2a).

The four series of A.T.C. debentures mentioned above, which were lettered from A to D, were dated respectively, August 1, 1951; April 1, 1953; April 1, 1954; and December 1, 1954. Each series was sold before the one following was offered for sale. The facts underlying the several transactions were these:

Events before Series A. In April 1951, representatives of A.T.C., seeking to raise capital (Tr. 2090-2099), approached petitioner, who at the time had been

in the securities business for 25 years (Tr. 2080-2083). Petitioner retained, as his counsel, Bernard Cahn, a former SEC lawyer (8a, 170a), to attend to all necessary legal details (11a-22a). John R. Peddy represented A.T.C. as its attorney (15a, 21a, 32a).

After full discussions, the A.T.C. representatives and petitioner finally agreed that an issue of convertible debentures, bearing monthly interest, would be sold, and that the issue would be brought out under SEC Regulation A, which exempts issues under $300,000 in any one year from full registration requirements (22a-30a, 87a; Tr. 537). A.T.C. did not have the funds necessary for full registration (425a; Tr. 383-386). A best efforts underwriting agreement was signed with petitioner (Govt. Ex. 2), Proctor signing as Secretary of A.T.C., under which petitioner's fee was to be 20 percent plus certain expenses (31a-32a).

The figures presented by the A.T.C. representatives showed that their company had had net earnings in 1948, 1949, and 1950 (30a). Using those figures, Cahn as attorney for petitioner, and Peddy as attorney for A.T.C., prepared the offering circular for Series A (35a). As Peddy was not experienced in SEC matters, Cahn did most of the writing (36a). The draft of the offering circular was submitted to the Washington office of the SEC (43a, 49a); that agency's comments were communicated to A.T.C. (45a), and its suggestions were fully adopted by A.T.C. (Tr. 387-389, 401-404, 406-409-A). Because of A.T.C.'s lack of funds, no independent audit was made in connection with Series A (46a-47a). The debentures were provided for by an indenture of A.T.C. (Govt. Ex. 4), under which Colonial Trust Co. of New York was trustee for the purpose, among others, of the payment of the interest

(49a-50a). While the issue was pending, petitioner purchased for $24,000 a block of A.T.C. debentures to enable it to carry on certain construction operations (51a).

Series A. The offering circular, dated August 15, 1951 (Govt. Ex. 1, facing 636a), disclosed this advance purchase (Govt. Ex. 5, 51a). Series A, consisting of $299,500 of 6 percent twenty-year convertible debentures offered at 100 percent was sold by petitioner's office between September and November 1951 (46a, 302a-304a; Tr. 2111-2112). Cahn's fee for his legal services in connection with Series A was $3,500 (Tr. 437, 439) plus warrants for 35,000 shares of A.T.C. stock (Tr. 435-436; Govt. Ex. 1, p. 11, facing 636a; 326a, 328a).

Events before Series B. In December 1951, petitioner advised Cahn of his having learned of a dispute among A.T.C. directors, involving on one side Starr, the general manager, and, on the other, Proctor and Jones (52a-55a), the latter having become President of A.T.C. about the time Series A was issued (50a). Cahn went to Seattle, attended A.T.C. directors' meetings early in February 1952, and was himself elected a director; and Starr resigned (57a-78a; Govt. Ex. 6).

While in Seattle, Cahn was shown an audit of A.T.C. made by Lybrand, Ross Brothers & Montgomery (Govt. Ex. 7), which had turned the corporation's surplus of $1,500 shown in the Series A offering circular (Govt. Ex. 1, p. 13, facing 636a) into a deficit of $40,000 (70a), by reason of write-off entries (72a).

Cahn attended another directors' meeting in Juneau in April 1952 at which one Sim was retained as A.T.C.'s new general manager (84a-87a, 197a).

Cahn resigned as director in June 1952 (91a). In July 1952, he was advised by Jones (Govt. Ex. 10, 89a) that "the situation is much worse financially than we had been led to believe in April." In December 1952, Jones wrote petitioner telling of A.T.C.'s need for funds (Govt. Ex. 11, 94a-95a); and Cahn advised petitioner to have Jones and Proctor come to New York (95a, 102a).

Proctor arrived in New York in February 1953, and had lengthy talks with petitioner and Cahn, in which he detailed A.T.C.'s need for funds; that Starr had embezzled money, and that the long distance service of the Alaska Communications System, which connected the scattered city exchanges of A.T.C. with one another (113a), was about to be cut off because of nonpayment of bills (112a-113a). Proctor stated, however, that the fourth quarter of 1952 would show a profit or at least that the break-even point had been reached, as Sim, the new manager, "was doing such a terrific job" (107a-108a).

Despite his previous statements that A.T.C. should not undertake further public financing (72a-73a, 86a, 87a, 106a; cf. Govt. Ex. 18, 124a-127a), Cahn now proposed that Proctor prepare the draft of a new offering circular to include financial data that would show that the break-even point had been reached (108a-111a).

While Cahn was waiting for the data requested, he telegraphed Jones that Colonial Trust Co., trustee under the Series A indenture, had complained that A.T.C.'s advance deposits for interest requirements thereunder were past due (Govt. Ex. 15, 103a).

Jones' draft of a proposed offering circular (120a) being deemed insufficient (119a), Cahn went out to

Seattle in March 1953 (123a, 127a, 132a), emphasized to Proctor the necessity for full disclosure (128a-131a), and, working with Proctor, prepared the draft of the offering circular for proposed Series B with figures furnished by the company (133a-135a).

A.T.C. needed money more quickly than an audit could be prepared or paid for (109a, 111a, 135a), but A.T.C.'s figures were checked, and passed as a fair statement, by representatives of the Lybrand firm (137a-138a, 191a, 202a). The draft offering circular was then submitted to and discussed with the Seattle office of the SEC (136a-139a). The draft was thereafter taken to New York for printing (140a); petitioner made another agreement personally to purchase an amount of Series B debentures (140a-141a); and thereafter the proposed offering circular was filed with the SEC without material variations from the draft (141a-142a).

Series B. In due course, this series of bonds, dated as of April 1, 1953 (Govt. Ex. 19, facing 638a), was issued under a similar indenture of A.T.C. with Colonial Trust Co. as trustee (Govt. Ex. 22). Series B comprised $150,000 6 percent ten year convertible debentures; these were sold by petitioner's office to the public at $70 per $100 face value, with an underwriting discount of $10, making the proceeds to A.T.C. 60 percent of the face value of the issue, less estimated underwriting expenses of $10,000 (Govt. Ex. 19, p. 1). Cahn's fee for his services in connection with Series B was $3,000 (Tr. 689-690). The last sale of Series B took place in June 1953 (Tr. 747-748).

Meanwhile, on April 23, 1953, Cahn wrote Jones (Govt. Ex. 24, 156a-160a), saying that although this

case "has been quite a headache to all of us," he and petitioner both felt that "the company is now in a position to go forward and become a successful operation."

Events before Series C. About a month later, Jones sent Cahn a copy of A.T.C.'s report showing a loss for the first quarter of 1953 in the amount of some $6,600 (163a-164a); Cahn remarked to petitioner that he thought A.T.C. had passed the break-even point (164a) and wrote Jones that he was concerned at the discrepancy between the break-even representation in the Series B offering circular and this reported new loss (165a-166a).

Some time in the summer of 1953, Cahn saw the Lybrand audit for the year 1952 (Govt. Ex. 27), which showed a loss for 1952 of some $98,000 (166a-169a). If A.T.C. had made a little in the fourth quarter, as its figures showed (170a), or even had broken even, the year's loss would not have been so great (171a). Cahn and petitioner agreed that the loss was far greater than had been indicated to petitioner at the time of the Series B offering (172a).

On December 7, 1953, Proctor wrote petitioner (Govt. Ex. 28, 176a-178a), enclosing A.T.C.'s financial statement for the first three quarters; he said that there had been little if any improvement; that Sim had been released; that the office had been moved to Seattle with substantial savings; but that the tax liability, then $71,000, had become "increasingly serious"; and that "The essential thing is to obtain a breathing spell from the bond interest." Proctor asked petitioner to "advise what can be done in this emergency." Petition wrote in pencil on the letter, which he sent Cahn (174a), "see if we can put out more bonds" (179a).

Cahn, as a Government witness, testified he telephoned petitioner (179a). He then was permitted to testify, over objection based on the confidential character of the attorney-client communication (179a-180a; see Appendix C, *infra*, pp. A27-A35), as to what he then said to his client, the petitioner Tellier. The details of the objection are summarized below, pp. 14-16.

In substance, Cahn then testified that he told petitioner that a new public offering "would involve you in great trouble" (181a); A.T.C. "is selling bonds to keep alive"; "this selling of bonds to pay back interest by the sale of new bonds will involve you in a Ponzi scheme" (182a).

Cahn said he would write a letter to take petitioner "off the hook" with Proctor and Jones (190a). In that letter he set forth why, in Cahn's opinion, no further public financing was possible. He did not repeat therein his forceful warning about involvement in a "Ponzi scheme." Cahn sent petitioner an original and two copies (182a-185a; Govt. Ex. 29, 185a-189a), dated December 18, 1953 (185a). Cahn refused to participate further, and did not (190a).

Neither Jones nor Proctor ever received a copy of Cahn's letter (492a, 539a). When Jones telephone Cahn later, Cahn said he was too busy to handle any further A.T.C. issues (489a-490a, 492a). Cahn never told Jones that Series C should not be issued (503a).

Jones—who was a lawyer (Tr. 3051)—then proceeded to prepare the offering circular for Series C, and had numerous conferences and written communications with the Seattle office of the SEC concerning it (504a-512a). All SEC suggestions were adopted (528a). Petitioner printed the offering circular after Jones had initialed his final draft (402a).

In January 1954, Colonial Trust Co. had received a letter from Jones (Govt. Ex. 41, 206a, 207a-210a), which stated that A.T.C. was unable to pay its interest on Series A and B; that it was in default on conditional sales contracts; and that it owed taxes of some $70,000. The letter spoke of "the extremely glooming outlook at the present time," and of the possibility of "a race between the bondholders and Bureau [of Internal Revenue] as to who takes over." This letter was considered by Colonial Trust Co.'s trusteeship committee, which determined that the bank would act as trustee under the indenture for Series C (211a-214a; Govt. Ex. 42; 216a-221a). Cahn had told the Colonial Trust Co.'s vice-president that he would not be counsel on Series C, but did not say there should be no such issue (222a). Colonial Trust Co. did act as trustee under the Series C indenture (Govt. Ex. 46).

Series C. Series C, dated April 1, 1954, comprised $270,000 of 6 percent ten year convertible debentures, sold to the public at $70 per $100, with the same underwriting arrangement as on Series B (Govt. Ex. 47, facing 640a), and the bulk of it was sold by June 1954 (422a).

Most of the proceeds of Series C were applied, as Colonial Trust Co.'s officers knew they must be (214a-221a), to the payment of existing obligations of A.T.C., including interest payments on the two earlier issues (213a-214a).

The record discloses that although Colonial Trust Co. retained counsel, Messrs. Engel, Judge, Miller & Sterling, who prepared opinions attesting to the legality of each A.T.C. debenture issue (Tr. 716-717; 546a-552a), such counsel did not feel it necessary to ascer-

tain what use was or had been made of the proceeds of earlier series (551a-552a); and further discloses that the Vice-President of Colonial Trust Co. in charge of the bank's trust committee (206a) never examined the finances of A.T.C. (214a-215a), beyond reading Jones' gloomy letter (Govt. Ex. 41, 207a-210a).

The offering circular for Series C disclosed (Govt. Ex. 47, p. 5, facing 640a) that all but about $8,000 of the aggregate proceeds of $189,000 was proposed to be used for purposes other than new capital items.

Series D. A.T.C. was still in need of funds to finance plant expansion essential to increase earnings, and despite the fact that its operating losses were steadily decreasing (260a-262a), it was not showing a profit from operations. Accordingly, in November 1954, a new offering was considered (Tr. 3146). Jones again prepared the draft of an offering circular, which he submitted to the Seattle office of the SEC (Tr. 3146-3148). All of that agency's numerous suggestions were adopted (513a-517a, 520a-528a).

Series D dated December 1, 1954, comprised $158,000 of 6 percent ten-year convertible debentures, offered to the public at $70 per $100, with the same underwriting arrangements as in Series B and C (Govt. Ex. 57, facing 642a). Colonial Trust Co. was trustee under the indenture (Govt. Ex. 56). The last of the Series D debentures were sold in May or June 1955 (Tr. 3853-3854).

Subsequent Events. Despite increased earnings based on rate increases (493a-496a), A.T.C. could still not meet its obligations. In July 1955, A.T.C. made its last payment to Colonial Trust Co. to pay interest on debentures, and in August 1955, petitioner made an

advance of over $4,300 for that purpose (Tr. 815), for which he was never reimbursed (251a, 262a). The last interest payment to bondholders was made on September 1, 1955 (Tr. 821), and on September 18, Colonial Trust Co. sent the bondholders a notice of default (Govt. Ex. 64, Tr. 819-820), although some $13,000, sufficient for three more monthly payments, were still on hand, and are still held by Colonial Trust Co. (224a; Tr. 821).

A.T.C.'s officers proposed to their bondholders a plan of reorganization under Chapter XI of the Bankruptcy Act, and about 90 percent consented to the plan (501a, 518a-519a). At that point, however, the SEC intervened and forced A.T.C. into a Chapter X reorganization (497a-502a; 518a-519a), which is still pending though there has been no adjudication of bankruptcy (Tr. 3313).

The record discloses an SEC investigation of A.T.C. and of petitioner's firm, Tellier & Co. (270a-276a, 469a, 499a-500a), and shows that most of A.T.C.'s records are now in the hands of SEC (259a, 263a-265a, 473a-476a). The indictment followed (502a), on December 1, 1955 (1a). All of Cahn's files had earlier been turned over to the U. S. Attorney (200a) and were in that official's possession at the time of the trial (195a).

Vital Occurrences at the Trial

(a) *Disclosure over objection of Cahn's advice to his client Tellier.* The objection to the testimony of the Government witness Cahn as to his statement to his client Tellier, the present petitioner, was based on the circumstance that this particular communication with its reference to a "Ponzi scheme," unlike previous and other statements testified to by him, was intended to be,

and was, confidential. Cahn had testified that he regarded each issue as a separate matter, (12a-13a), and petitioner's counsel had indicated during the first portions of Cahn's examination that he was not waiving his right to object later (20a, 174a-175a). The prosecution argued that the conversation objected to by petitioner had been admitted at the first trial, and was moreover within the scope of a waiver executed by Tellier, authorizing disclosure by Cahn to the SEC.

Counsel for the petitioner stated that the conversation had been admitted at the first trial over his objection, and that, if the SEC waiver was relied on, he would show that it was obtained by duress.

The trial judge ruled that the alleged SEC waiver was confined by its terms to the SEC investigation and did not include use in a criminal trial.

However, the trial judge admitted Cahn's testimony over objection on the theory that since Cahn had been permitted to testify as to some conversations with his client—which had related to Series A and B—it was too late to object at this juncture to new conversations relating to one or more subsequent debenture issues; and he also rejected petitioner's contention that the present communication differed from the others.

By direction of the trial judge (Tr. 349, 359), the foregoing colloquy was treated as not part of the record of trial, but available for inclusion in an appendix to the brief on appeal. It is set forth in Appendix C, *infra,* pp. A27-A35.

The letter Cahn wrote petitioner following the conversation in question (Govt. Ex. 29; 185a-189a), on which the majority below relied to hold the conversation not privileged (*infra,* pp. A9-A12), was not in-

troduced by the prosecution at the trial until Cahn had first testified as to what he had told his client orally (180a-183a).

(b) *Admission of records of A.T.C., which was tried without appearing and without counsel, and of schedules and testimony based on such records, which were not shown to have been kept in the regular course of business.* A.T.C., although named as a defendant in the indictment (644a), did not appear to plead or to be tried, its Trustee in Chapter X proceedings having been instructed by the U. S. District Court for the Western District of Washington not to appear (2a). A plea of not guilty was entered on its behalf by the trial court (2a). At the commencement of the trial, petitioner objected to A.T.C.'s trial in those circumstances, on the ground that, since the corporation was unrepresented, evidence prejudicial to him was likely to be introduced (5a-8a).

The prosecution witness Casagrande, of the New York State Attorney General's Office, purported to identify a bulky mass of photostats, ten inches high, as being photostats of the books and records of A.T.C. (229a-241a). His testimony in substance was that he had gone to the office of A.T.C. in 1956, asked for the books and records, and had been given, by an unidentified person, certain books and records which he had caused to be photostated, and which photostated books and records constituted Government Exhibit 71 (232a). On objection that Casagrande's testimony was hearsay, the witness modified his testimony to state that the records given him purported to be the records of A.T.C. (230a).

When the first schedule, prepared by Casagrande and based on the photostats, was offered in evidence, objec-

tion was made by petitioner that the books and records themselves were not in evidence and, further, that the books and records themselves "have not been identified in accordance with the Federal Statute as records kept in the regular course of business, properly identified by one competent so to identify them" (234a). Counsel for the Government attempted to meet the first objection by offering Govt. Ex. 71 in evidence (234a); he made no effort to identify that exhibit further; and the court then overruled the objection, saying in substance that if the defendants could later prove that the contents of the exhibits were not what the witness Casagrande said they were, a motion to strike would be entertained (236a-237a).

Thereafter Casagrande introduced three schedules prepared by him (Govt. Ex. 76, 78, 80), which purported to set forth in summary form the differences between the use of the proceeds of Series B, C, and D contemplated by the respective offering circulars, and the alleged use made of those proceeds. Casagrande testified that each of those schedules was based in part on Government Exhibit 71 (245a-258a), and petitioner objected to each on that ground (250a, 253a-256a, 258a).

Petitioner then moved for an instruction limiting Government Exhibit 71 as evidence against A.T.C. only, and the judge reserved decision (262a-263a).

Government Exhibit 71 was subsequently identified, in part, as records of A.T.C. (478a-479a, 545a-546a). On the latter occasion, the judge said (545a), "71. This is what we don't like to refer to if we can help it." At the end of the case, the court denied petitioner's motion to limit Government Exhibit 71 to the corporation alone (563a).

As has been stated, *supra,* p. 5, no verdict was found against A.T.C., but it was sentenced none the less on the view (4a) "that verdict against Defts. Jones and Proctor may be treated as a verdict against Corporation." See also 625a-628a.

Proceedings in the court below. The judgments of conviction as to both petitioner and the appellant Proctor were affirmed below (*infra,* pp. A1-A19, A25-A26), Judge Lumbard voting, in a dissenting opinion, to reverse petitioner's conviction because of the violation of the attorney-client privilege (*infra,* pp. A19-A24).

(i) As to that point, the majority held (*infra,* pp. A9-A12) that, since the substance of what Cahn told his client Tellier was to be set forth in a letter to Tellier that the latter would forward to Proctor and Jones to get "off the hook" with them, the conversation itself was not privileged, "for the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content" (*infra,* p. A12).

Judge Lumbard dissented (pp. A19-A24), on grounds sufficiently set forth in the following excerpts from his opinion: "The majority opinion means that an attorney by his very act of warning a client against imprudent and unlawful action is placing himself in the position of principal witness against the client he seeks to aid. * * * Thus it seems to me that the reasoning of the majority sucks all the vitality and usefulness from the attorney-client privilege; it whittles the privilege to nothing and, worse still, it makes the attorney a witness against his client. * * * The mere fact that some conclusions of the attorney-client exchange are to be conveyed to others is not an excuse or a reason for say-

ing that the parties did not intend any part of the exchange to be confidential. Such reasoning is contrary to the facts of life and to the implicit nature of man-to-man speaking; it eats the heart out of the attorney-client relationship. The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

(ii) As to the A.T.C. books and records, the court below unanimously held (*infra*, p. A13) that "there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business," but none the less held them admissible under *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726, to the effect that if a defendant has made representations concerning the financial condition of a corporation, the books of that corporation are competent evidence against him in a mail fraud prosecution. The opinion below did not discuss the requirements of regularity set forth in 28 U.S.C. § 1732(a) (*supra*, p. 3).

(iii) The remaining points decided below are not specified here, inasmuch as they were not sought to be further reviewed either on petition for rehearing below or in the present petition here.

REASONS FOR GRANTING THE WRIT

However much the issues now presented might be sought to be minimized by characterizing them as mere questions of evidence, in fact they involve protections of the individual as vital and as significant as any actually written into the Constitution.

The first of these is the attorney-client privilege, which, together with similar immunities attaching to communications with spouses, physicians, and priests,

protects from disclosure by trusted confidants communications that the privilege against self-incrimination protects from disclosure by the individual himself. The grave impairment of the attorney-client privilege sanctioned by the court below thus permits the Government, by compelling the attorney to testify, "to obtain disclosure in court of what is whispered in the closet" (Brandeis, J., in *Olmstead* v. *United States*, 277 U.S. 438, 473) just as effectively as if the utterance had been extracted from his client, the petitioner. In view of Criminal Rule 26 (*supra*, pp. 2-3), only this Court can reaffirm the basic protection that up to now had been inherent in the "wise and liberal policy" underlying the privilege.[1]

The second question presented involves a gross misreading of a remedial statute, 28 U.S.C. § 1732(a) (*supra*, p. 3). Designed to ameliorate the almost insuperable obstacles that the old shopbook rule had placed in the way of proof, the Act nonetheless circumscribed its liberality with the safeguard of regularity in order to protect parties against untrustworthy hearsay. The ruling below, which (contrary to every other decision on the point) excises from the statute the safeguard of regularity put there by Congress, calls for review here just as did *Palmer* v. *Hoffman*, 318 U.S. 109, where however the aberration sought to be

[1] "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458, *per* Bradley, J.

read into the same statute had not found acceptance at any stage.

First. A fair reading of the decision below on the attorney-client privilege is that a conversation between attorney and client, otherwise privileged, ceases to be protected from disclosure whenever the conversation results in a communication to others concerning the same generalized subject-matter. Otherwise stated, any letter written to an outsider after a communication between attorney and client destroys the privilege which attached to that communication. This has never been the law up to now, and assuredly the holding does not reflect any peculiarity of local practice, for the state rule is to the contrary. See *Matter of Matheson,* 283 N.Y. 44, 46, 27 N.E. 2d 427.[2] There is no need at this juncture to spell out in detail the basic unsoundness of the opinion below; it is sufficient here simply to incorporate Judge Lumbard's strictures (*infra,* pp. A19-A24) by reference.

But it will not be inappropriate to dwell briefly on the significance of privileged communications as an element of the citizen's basic right to his security against arbitrary intrusion. Just as the Fourth Amendment (and, to some extent, the Fourteenth, see *Wolf* v. *Colorado,* 338 U.S. 25, 27), protect against unreasonable searches, just as the Fifth and the Fourteenth protect against extortion of testimony from the individual himself, so does the privilege attaching to communications

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[2] "Even though the deceased had expressed the same testamentary intention in the presence of the same witness and others just previous to the private interview, the very fact that he repeated it in the more intimate private conference with his attorney had an important bearing on the sharply-contested issues, particularly that of undue influence. It is on this error that our reversal rests."

by and with spouses, attorneys, physicians, and priests delineate an area of privacy protected against intrusion even by the Government itself. The essential social interest served is the same. And for the same reason that waivers of the privilege against self-incrimination are to be narrowly construed (*Emspak* v. *United States*, 349 U.S. 190, 196-198, and cases there cited), so there should be no fashioning of a waiver out of thin air, as the court below plainly did in the present case, in order to force an attorney to testify against and assist in convicting his erstwhile client.

Significantly enough, while the district court found a waiver in what had preceded Cahn's "Ponzi scheme" testimony (pp. 14-16, *supra;* Appendix C *infra,* pp. A27-A35), the court of appeals looked to the letter sent after that conversation took place, a letter that was introduced at the trial only after the conversation in question had already been testified to. Otherwise stated, the court of appeals was not prepared to approve the admission of the conversation on the grounds of prior waiver that the district court had espoused. Those grounds, as we show briefly in the margin lest they be availed of here as alternative grounds for affirmance (*United States* v. *American Ry. Exp. Co.*, 265 U.S. 425; *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 134), are plainly without merit.[3]

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[3] Cahn testified (12a-13a) that each series of A.T.C. debentures was a separate transaction. Consequently even if there had been a waiver as to otherwise privileged conversations dealing with Series A and B, that waiver would not have extended to the present conversation, which dealt with what became Series C. Cf. *Magida* v. *Continental Can Co.*, 12 F.R.D. 74, 77 (S. D. N. Y.). Moreover, many of the previous conversations were not intended to be confidential, either because third persons were present or because the advice dealt with financial rather than with legal matters

The majority below did not express disagreement with Judge Lumbard's conclusion (*infra,* p. A24) that "If the admission of the evidence was error, I think it follows that it was so harmful to Tellier's defense that his conviction should be reversed"; and indeed the prosecutor's conduct at the trial established the pivotal importance of that evidence.

The prosecutor was not satisfied with the later letter on which the court below relied; he was determined to burn into the jury's mind that single explosive expression—a "Ponzi scheme"—from a private telephone conversation between a lawyer and his client. Those ringing words were used in the prosecutor's opening statement (Tr. 35); he made a determined and ultimately successful effort to have this conversation admitted (Tr. 344-360; Appendix C *infra,* pp. A27-A35); and he recurred to that expression no less than four times in his summing up (Tr. 4096, 4097; 564a, 565a).

A "Ponzi scheme"[4]—that phrase of petitioner's own lawyer was used to make an indelible impression on the jury, and of course it did; once uttered, it colored the whole trial beyond possibility of repair. As Mr. Justice Cardozo said (*Shepard* v. *United States,* 290 U.S. 96, 104), "The reverberating clang of those accusatory words would drown all weaker sounds." Not only do the prosecutor's repeated references to and reliance on "Ponzi scheme" establish its signifi-

(29a, 78a, 117a-118a). Finally, petitioner's counsel made it abundantly clear, during Cahn's examination as to the first two series, that he was not waiving his right to object later (20a, 174a-175a).

[4] For the details of the original Ponzi scheme, see *In re Ponzi,* 268 Fed. 997, 1000, and *Lowell* v. *Brown,* 280 Fed. 193, 196-197, both D. Mass.

cance in the present connection,[5] they also emphasize the unanswerable soundness of Judge Lumbard's observation (*infra*, p. A23) that "The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

Conversations between attorney and client are not subject to motions to suppress. See Criminal Rule 41(e); *In re Fried*, 161 F. 2d 453 (C. A. 2), certiorari granted *sub nom. United States* v. *Fried*, 331 U.S. 804, and dismissed, 332 U.S. 807; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C. A. 1), certiorari denied, 344 U.S. 866; *Lapides* v. *United States*, 215 F. 2d 253 (C. A. 2); *Biggs* v. *United States*, 246 F. 2d 40 (C. A. 6), certiorari denied, 355 U.S. 922. Their protection therefore depends on rulings on "evidence" made at the trial, rulings which, inescapably, must be fashioned by this Court for the trial of every criminal case in the federal courts. Criminal Rule 26 (*supra*, pp. 2-3); *Funk* v. *United States*, 290 U.S. 371; *Wolfle* v. *United States*, 291 U.S. 7. Indeed, Rule 26 specifically speaks of "privileges of witnesses" as a matter to be determined by common law principles in the light of reason and experience. Review by this Court is therefore required lest the protection traditionally and because of high public policy accorded private conferences between a lawyer and his client be sharply curtailed—as in this case—to the point of virtual disappearance.

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[5] "When a district attorney so urgently relies upon incompetent evidence for the conviction of a defendant we feel quite confirmed in our opinion that it was important and not at all negligible." *People* v. *Sing*, 242 N.Y. 419, 424, 152 N.E. 248, 249; *People* v. *Rosenthal*, 289 N.Y. 482, 488, 46 N.E. 2d 895, 899.

Second. What is now 28 U.S.C. § 1732(a) (*supra*, p. 3), was first enacted in 1936[6] in order to ameliorate the stultifying harshness of the common law shop-book rule, which, in the face of modern business and bookkeeping methods, effectually prevented proof of many normal business transactions.[7] The statute effected this amelioration by rendering admissible what was plainly hearsay, but provided a safeguard of trustworthiness in the requirement that the entries first be shown to have been made in the regular course of business.

In *Palmer* v. *Hoffman*, 318 U.S. 109, this Court held that the expression "regular course of business" meant just that, and did not include accident memoranda dictated by railroad employees. Such memoranda, the Court said (p. 114), "are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading."

The present case illustrates another—and much more harmful—disregard and indeed abandonment of the safeguards of the statute. The Act makes the underlying business records here in question admissible only [1] "if made in regular course of any business, and [2] if it was the regular course of such business to make such memorandum or record at the time or within a reasonable time thereafter." Here the court below

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[6] Sec. 1 of the Act of June 20, 1936, c. 640, 49 Stat. 1561; later 28 U.S.C. [1940-1946 eds.] § 695; after 1948, 28 U.S.C. § 1732; since 1951, 28 U.S.C. § 1732(a).

[7] See H.R. Rep. 2357 and Sen. Rep. 1965, both 74th Cong., 2d Sess.; Morgan *et al.*, *The Law of Evidence: Some Proposals for its Reform* (Commonwealth Fund, 1927) 51-63 (Proof of Business Transactions to Harmonize with Current Business Practice); 5 Wigmore, *Evidence* (3d ed. 1940) §§ 1520-1530.

conceded that this requirement was not met, saying (*infra*, p. A13), "An examination of the record indicates that there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business." Yet it upheld their admission none the less.[8]

Plainly, therefore, there has been no compliance with the statute, since, as the court below frankly admitted, there was no proof of the necessary foundation of regularity which is prerequisite to the admissibility of business entries. *Pulley* v. *United States*, 253 F. 2d 796, 797 (C. A. 8); *United States* v. *Indian Trailer Corp.*, 226 F. 2d 595, 599-600 (C. A. 7); *Bruce* v. *McClure*, 220 F. 2d 330, 334-336 (C. A. 5); *Hartzog* v. *United States*, 217 F. 2d 706, 710 (C. A. 4); *NLRB* v. *Sharples Chemicals*, 209 F. 2d 645, 653 (C. A. 6); *Schmeller* v. *United States*, 143 F. 2d 544, 550 (C. A. 6); *Smith* v. *Bear*, 237 F. 2d 79, 88-89 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863, 869 (C. A. 2). What has happened, therefore, is that, in the face of the clear words of the statute, books of a corporation not shown to have been kept in the regular course of business as required by its explicit terms, have been erroneously admitted over articulated objection for the truth of the matters contained therein. As Judge L. Hand said in *United States* v. *Grayson*, *loc. cit. supra*, this is "multiple hearsay," admissibility of which involved a complete disregard of the statute, and which, in the setting of the

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[8] Because he deems it a question outside the appropriate scope of the writ of certiorari, petitioner does not ask this Court to review the holding below that, on the entire record, the prosecution had *prima facie* established the genuineness (as distinguished from the regularity under the statute) of what was comprised within Govt. Ex. 71.

present case, was error plainly substantial in character.[9]

The Court below rested its ruling on *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726. If that case had simply held that, in a mail fraud prosecution, a defendant making representations regarding a corporation is chargeable with all of that corporation's books where he himself had control of the corporation, petitioner here would not quarrel with the holding, though it would be inapplicable to his situation: Petitioner was not in control of A.T.C., he was neither an officer nor a director thereof, and he owned no stock therein; he was merely the best-efforts underwriter for its debentures, and indeed was taxed by the prosecution for having owned none of those himself (Tr. 2062-2063, 4111; U. S. Br., C. A. 2, 28).

But *Feinberg* actually went farther. The court there said (140 F. 2d at 596) that books of a corporation were competent against one not in control "under our decision in Parker v. United States, 2 Cir., 203 F. 950, where we held that when the accused, in a prosecution involving the fraudulent use of the mails, had made representations as to the financial condition of a cor-

[9] Govt. Ex. 71, the photostats of A.T.C.'s books and records, was the basis, not only of the witness Casagrande's oral testimony, but also of his three schedules that purported to set forth in summary form the differences between the use of the proceeds of Series B, C, and D that was contemplated by the respective offering circulars, and the use that was allegedly made of those proceeds (Govt. Ex. 76, 78, 80). That oral testimony and those schedules—each of which was duly objected to by Tellier on the specific ground that it was improperly based on Govt. Ex. 71 (250a, 253a-256a, 258a)—went to the very heart of the alleged misrepresentations charged in the indictment, and thus contributed significantly to the verdict.

poration, the books of account of that corporation are competent against him." But this was a misreading of *Parker*.

Parker in fact laid down no such broad rule and simply followed the earlier decision on Parker's co-defendants' separate writ of error, *Wilson* v. *United States*, 190 Fed. 427 (C. A. 2); see 203 Fed. at 951, where the Second Circuit said, "We approved the admission of this documentary evidence in the Wilson Case and fail to see why the principles there laid down are not controlling here." But *Wilson* in turn involved regular entries; see 190 Fed. at 437: "* * * a person who makes statements concerning the condition or affairs of a corporation is not in a position to object when the *regular* books of the corporation are used against him." [Italics added.] Indeed, *Wilson* having been decided in 1911, some twenty-five years before the regular business entry statute, the matter of the regularity of the books there involved was discussed at considerable length (190 Fed. at 436-438). Thus *Feinberg* plainly misread the precedent on which it purported to rely.

The court below in the present case, by perpetuating the *Feinberg* misreading of the earlier decisions, has effectually cut the safeguard of regularity out of the statute. It has therefore eliminated the requirement of the foundation of regularity upon which every other circuit has insisted (*Pulley* v. *United States*, 253 F. 2d 796 (C. A. 8); *United States* v. *Indian Trailer Corp.*, 226 F. 2d 595 (C. A. 7); *Bruce* v. *McClure*, 220 F. 2d 330 (C. A. 5); *Hartzog* v. *United States*, 217 F. 2d 706 (C. A. 4); *NLRB* v. *Sharples Chemicals*, 209 F. 2d 645 (C. A. 6); *Schmeller* v. *United States*, 143 F. 2d 544 (C. A. 6)), and which has similarly been insisted

on by every state court dealing with identical legislation. E.g., *Matter of Roge* v. *Valentine*, 280 N.Y. 268, 278, 20 N.E. 2d 751, 755.[10]

As the matter now stands, 28 U.S.C. § 1732(a) has been held to authorize multiple hearsay, and to charge a defendant, not only with a corporation's regular business entries, but with the truth of the matters stated in any paper found on its premises, wholly without proof of their regularity.[11] We believe that this mutilating rewriting of an Act of Congress should not go unreviewed.

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[10] "It does not sufficiently appear in this case that the notations on the record cards and check stubs were made in the regular course of business and at the time of the transaction noted or within a reasonable time thereafter. Technical defects might be disregarded, but here the defects are more than technical. Notations made by third persons, records of past transactions have probative force only when made under conditions that at least provisional confidence can be placed in them. The statute defines the conditions which in the opinion of the Legislature would give to the notation of records sufficient assurance of verity that they might be accepted provisionally as proof of the facts stated. In this case there is a complete lack of proven basis for such assurance of verity."

Numerous states have statutes identical with or similar to 28 U.S.C. § 1732(a). See 5 Wigmore, *Evidence* (3d ed. 1940 and 1957 Pocket Supp.) § 1520. For other state cases rejecting evidence thereunder for want of a proper foundation of regularity, see *Williams* v. *Caples*, 342 Pa. 230, 235, 20 A. 2d 302, 304-305; *In re Daniel's Estate*, 185 Ore. 642, 653-654, 205 P. 2d 167, 172-173; *Kane* v. *Pear*, 343 Ill. App. 352, 98 N.E. 2d 857.

[11] The conglomerate mass of unrelated papers contained in Government's Exhibit 71 is itemized in Appendix D *infra*, pp. A36-A39.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JUNE 1958.

APPENDIX A

OPINIONS BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 104—October Term, 1957.

(Argued December 10, 1957 Decided May 6, 1958.)

Docket No. 24665

UNITED STATES OF AMERICA,

Appellee,

v.

WALTER F. TELLIER, ALBERT JOSEPH PROCTOR,

Defendants-Appellants,

ELTON B. JONES and ALASKA TELEPHONE CORPORATION,

Defendants.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Defendant-appellants were convicted by a jury, Eastern District of New York, Byers, *J.* Defendant Tellier appeals alleging that specific reversible errors prejudicial to him occurred during the trial. Defendant Proctor appeals setting forth that there was insufficient evidence to warrant submission of the case against him to the jury. Affirmed as to both defendant-appellants.

CORNELIUS W. WICKERSHAM, JR., U. S. Atty., E. D. N. Y. (Paul Windels, Jr., Spec. Asst. U. S. Atty., Julian Guy Linker, Asst. U. S. Atty.) *for Appellee.*

RICHARD J. BURKE, J. BERTRAM WEGMAN (Saul Gordon, N. Y. C., Frederick Bernays Wiener, Washington, D. C., of Counsel), New York City, *for appellant Tellier.*

COLTON & PINKHAM, New York City, *for appellant Proctor.*

WATERMAN, *Circuit Judge:*

The appellants, Walter F. Tellier and Albert J. Proctor, were tried and convicted upon a thirty-six count indictment charging them with violations of the fraud section of the Securities Act of 1933, 15 U. S. C. 77p(a); with violations of the mail fraud statute, 18 U. S. C. §1341; and with a conspiracy to violate each of these statutes, 18 U. S. C. §371. The charges in the indictment arise out of the public sale of four series of debentures during the years 1951 through 1955. Tellier, who received concurrent sentences of four and one-half years on each count and was fined a total of $18,000, does not contest the sufficiency of the evidence against him. He does contend, however, that reversal is required because of allegedly erroneous rulings made by the trial judge during the course of the trial. Specifically, it is claimed that the trial court erred in permitting testimony Tellier alleges was a violation of the attorney-client privilege, and also erred in the following: (1) the admission into evidence of the corporate records of Alaska Telephone Corporation (ATC), (2) the exclusion of evidence pertaining to the financial condition of ATC at the time of trial, (3) the failure of the trial judge to order production of a report made by a government witness, and (4) the failure of the trial judge to give a requested instruction. Proctor, who received suspended concurrent sentences of nine months on each of

the counts in the indictment, contests only the sufficiency of the evidence to support the verdicts against him.

ATC was formed in 1948 to acquire and operate independent telephone and electric power systems in Alaska. Among the promoters was the appellant Proctor, who, upon incorporation, was elected a director of the corporation and, in 1951, its secretary. Proctor enlisted the services of the defendant Elton B. Jones, a Seattle attorney, who was also elected a director and became the company's counsel. After its incorporation ATC acquired several telephone exchanges, with approximately 700 subscribers, located in small Alaskan towns. This property was obtained partly for cash and stock, and partly on credit subject to mortgages. The corporation had insufficient funds to meet operating expenses and accruing mortgage obligations, and it was unsuccessful in several attempts to raise the needed capital.

In April 1951, Major William Maxey, the president and general manager of ATC, together with D. Sherman Starr, the vice-president, approached Tellier & Co., a securities firm located in New York City, concerning the possibility of raising needed funds. Tellier & Co. was owned and controlled by the appellant Tellier, who employed between twenty and thirty salesmen to sell over the telephone the securities handled by his firm. When Tellier was approached by the ATC representatives he retained Bernard D. Cahn, an attorney formerly employed by the Securities & Exchange Commission, to represent Tellier & Co. After some discussion between Tellier and the ATC representatives it was decided to offer for public sale an issue of securities of an amount less than $300,000. The reason for this limitation was SEC Regulation A, the General Exemption Regulation, which exempted from SEC registration certain issues of securities if the aggregate offering price of the issue did not exceed $300,000.[1] At Tellier's sug-

[1] See 17 Code of Federal Regulations 230.215 to 230.224.

gestion, and over some objection by Cahn and the New York counsel for ATC, it was decided that the securities to be issued were to be convertible twenty-year debentures carrying interest at an annual rate of 6% payable monthly. Tellier & Co. agreed to act as best-efforts underwriter for these debentures, labeled "Series A," and to receive therefor 20% of the face amount of the securities sold. In addition, it was to receive expenses in an amount not to exceed $20,000.

Cahn's objection to the sale of debentures, rather than of common stock, was based upon the failure of ATC to prove that it had earning capacity. An unaudited financial statement prepared by ATC representatives disclosed that the corporation had barely passed the break-even point during the years 1948-1950.[2] Nevertheless, the statement was used in the offering circular prepared by Cahn and registered with the SEC. Within several months of issuance all of the debentures, which had been offered at par, were sold by Tellier & Co. Subsequently, an independent accounting firm was hired to audit ATC's books. The audit revealed that the profit figures contained in the Series A offering circular were erroneous; and that, in fact, ATC had been losing money since its incorporation. The total deficit up to 1951 was about $40,000, with the result that ATC was insolvent. In 1951 ATC additionally lost in excess of $45,000. At Cahn's insistence the corrected information was sent out to all those who had purchased debentures.

In the meantime, Maxey and Starr had severed all connections with ATC, and Cahn who at one time had been elected a director of the corporation resigned his director-

[2] The unaudited statements for those years reflected net profits as follows:

1948	$1,053
1949	4,113
1950	3,784

ship. The need for additional capital continued to plague ATC, and Proctor and Jones spoke to Cahn about this. Cahn told them that additional public financing was inadvisable as long as the corporation continued to operate at a loss. At Cahn's suggestion attempts were made to obtain private financing. This project failed. ATC was now in debt to the Government for money withheld from employees' pay for employees' income taxes and for excise taxes which had been collected from subscribers. In addition, ATC had not turned over to Alaska Communications System long distance toll charges due it which had been collected from ATC subscribers. Finally, the trustee under the Series A trust indenture complained that although sufficient deposits were made with it, so as to enable it to make timely payment of the monthly interest charges, the corporation nevertheless was not maintaining a sufficient advance deposit to provide such payments for a six months period as it was required to do by the indenture.

In view of ATC's immediate need of funds and its inability to obtain them through a private financing, Proctor then approached Tellier to arrange additional public financing. Cahn repeated an earlier warning against public financing, but Proctor represented that ATC was reducing its losses, that it had reached the break-even point, and that the last quarter of 1952 would show a profit. Cahn's request for an audit was met with a reply by Proctor that this was not possible because ATC still owed the auditors a large fee. He insisted, however, that the corporation's financial status was considerably improved.

Over Cahn's objection it was then decided that ATC should issue additional debentures; and, to placate Cahn, it was agreed that common stock should also be sold. Cahn acquiesced, but urged upon Proctor and Tellier the importance of the representation that ATC was now operating

at a profit. Proctor agreed to supply Cahn with the supporting financial statements, and several months later he did so. An offering circular was prepared by Cahn and Proctor which represented that ATC had reached the break-even point and that "Net proceeds of this issue will be used for expansion and new equipment and for working capital needed to continue operations." Debentures in the face amount of $150,000 were then issued and offered for sale at a 30% discount. These debentures, labeled "Series B," were in form substantially similar to those previously issued except that they matured in ten years rather than twenty. Tellier's underwriting fee was 10% of the face amount plus $10,000 for expenses. Within a month Tellier had sold all of the debentures, though he was unable to sell any substantial percentage of the 40,000 shares of common stock which had been offered at the same time. A later audit revealed that of the $150,000 face amount of these Series B debentures only $9,000 was expended for new equipment, and for working capital.

Then, before another month had passed, the anticipated audit report disclosed that ATC had not made the profit in the last quarter of 1952 that Proctor had represented would be made. In fact, its losses for that quarter were the greatest in its history, and its total loss for the year was nearly $100,000. In addition, contrary to Proctor's optimistic prediction, it lost money during the first quarter of 1953. This audit also showed, as of the date the report was made, that the Government had filed tax liens against substantially all of ATC's property.

So the proceeds of the Series B debentures appear to have benefited ATC no more than did the proceeds of Series A, and another year went by. Then, in December 1953 Proctor wrote Tellier, enclosing a financial statement for the first three quarters of that year, stating that there had "been little, if any, improvement over the previous

period." After setting forth the financial difficulties which the company faced, Proctor again represented that "we believe the corporation is currently operating in the black, * * *"[3] and suggested a sale of additional securities so as to obtain a breathing spell from the bond interest * * *" Tellier contacted Cahn about the possibility of selling additional debentures. Cahn refused to handle the transaction. He warned Tellier that ATC, with its consistent record of losses, was merely borrowing money as a substitute for earning money and suggested that the sale of new debentures to get money to pay interest on the old debentures might be a criminal fraud which could involve Tellier in "great trouble." Nevertheless, Tellier, Proctor and Jones decided to go ahead and issue additional debentures, this time in the face amount of $270,000. The arrangements for the underwriting and the terms of the debentures were substantially similar to those of Series B. The offering circular prepared in connection with the sale of these debentures, denominated "Series C," stated that the "Net proceeds of this issue will be used for expansion and new equipment, for working capital needed to continue operations, and to liquidate delinquent taxes." No mention was made of the tax liens that now had been filed by the Government, of any impending mortgage foreclosures, of the necessity of using a substantial portion of the proceeds for meeting delinquent interest prepayment under the Series A and B indentures, nor of the existence of the defaults under the prior debenture issues.

The last one of the Series C debentures was sold approximately two months after the issue was offered. Shortly thereafter, Proctor assumed the presidency of ATC, and Jones replaced Proctor as Secretary-Treasurer. At Tellier's request Proctor prepared a letter to all the debenture holders which optimistically reported ATC's financial position and informed them that their debentures could

[3] During the year 1953 ATC lost $66,681.18.

be converted into common stock "at a rather substantial premium." The report did not tell the debenture holders, as Tellier was subsequently told by Proctor, that "it was not possible to apply the funds [proceeds of the Series C debentures] as originally allocated." Nor did the report mention the company's insolvency or its continued operating losses. Less than two months after this report was sent out, ATC again went into default on the interest prepayments required to be deposited with the trustee under the Series A, B and C indentures. Also, by this time, the proceeds of the Series C issue were exhausted Consequently, Proctor came to New York in October 1954 to arrange with Tellier for the issuance of a fourth series of debentures. So "Series D" came into being, consisting of ten-year, 6% convertible debentures in a total face amount of $158,000, interest payable monthly with the same prepayment deposit provisions as in Series A, B, and C. The offering circular for this series again stated that "Net proceeds of this issue will be used for expansion and new equipment, for working capital needed to continue operations, and to liquidate delinquent taxes." The circular did not mention, however, that a large portion of the proceeds of the issue were already committed to be deposited with the indenture trustee for interest prepayments required to be so deposited by the terms of all four indentures, and also were committed to pay the trustee its fees and expenses. The offering price of a $100 Series D debenture was $70, and although sales resistance was somewhat greater to this issue, within seven months Tellier had been able to dispose of practically all of this issue, also. ATC continued to lose money, as it had in every year of its existence. Finally, in the autumn of 1955, it filed under Chapter XI of the Bankruptcy Act. In November 1955, a receiver was appointed for the corporation by the United States District Court for the Western District of Washington. Later that month ATC filed an amended petition under Chapter X of the

Bankruptcy Act and the receiver was appointed Trustee in Bankruptcy.

I

The chief witness for the Government was Cahn, Tellier's one-time attorney and one-time director of ATC. Cahn testified to numerous conversations and communications between Tellier, Proctor, Jones, himself and others. With one exception this testimony was admitted without objection by Tellier. The lone objection related to the telephone conversation between Cahn and Tellier in December 1953 in which Cahn warned Tellier against the proposed issuance of a third series of debentures. Tellier urges that this conversation unlike the others to which Cahn testified, was intended as a confidential communication between an attorney and his client concerning the legal affairs of the client. Hence he contends reversible error was committed by the admission of this testimony into evidence. Proper evaluation of Tellier's position requires that we detail with greater specificity the circumstances relating to the conversation objected to.

On December 7, 1953 Proctor wrote Tellier outlining ATC's precarious financial position. He urged upon Tellier the necessity for obtaining additional funds and suggested another public sale of securities. Tellier, after reading Proctor's letter, sent it to Cahn with the following notation:

> "Berney, see if we can put out more bonds. W.F.T."

And then under that is another notation:

> "Another one hundred fifty thousand issue to net them ninety should do the trick or maybe two hundred thousand dollar issue. The common don't sell so it can be withdrawn or let die."
>
> "W.F.T."

Upon receiving the letter, Cahn immediately telephoned Tellier, and warned him not to go ahead with any additional public offerings for to do so would involve him in "great trouble." He pointed out that Proctor's letter proposed to use the proceeds of the new issue for the same purposes that the Series B offering circular represented that the proceeds of the Series B were to be used for, that the representation made in the Series B circular that ATC had reached the break-even point had proven false, that ATC was selling debentures as a substitute for earning money, and that "this selling of bonds to pay back interest by the sale of new bonds will involve you in a Ponzi scheme." Cahn concluded the conversation by informing Tellier that he would write a letter to Tellier, with copies for Proctor and Jones, substantially setting forth the telephone conversation and pointing out that for legal reasons there should not be any public sales at this time. Cahn prepared the letter, with copies, and sent the letter and copies to Tellier. There is some conflict in the record with respect to whether Tellier ever forwarded the copies so received by him to Proctor and Jones. In any event, Tellier wrote Jones on the same day that he had talked to Cahn that

> "Bernie Cahn does not believe it would be possible for you to get a filing through the S.E.C. at this time."

It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential. "The moment confidence ceases," said Lord Eldon, "privilege ceases." *Parkhurst* v. *Lowten,* 2 Swanst. 194, 216 (1819). Consult 8 Wigmore on Evidence §§2311-16 (3rd ed. 1940). Thus it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others. *In re Fisher,* 51 F. 2d 424 (S. D. N. Y. 1931); *Wilcoxon* v. *United States,* 231 F. 2d

384 (10 Cir. 1956), cert. denied, 351 U. S. 943; *United States* v. *Shibley*, 112 F. Supp. 734 (S. D. Cal. 1953).

We conclude that Cahn's advice to Tellier was not privileged from disclosure at the trial, for, under the circumstances presented in the record, it is clear that this advice was not understood by either Cahn or Tellier to be confidential. The evidence establishes that Tellier expected Cahn to prepare a letter which was to set forth Cahn's objections to the issuance of additional debentures and which was to be forwarded to Proctor and Jones for their enlightenment. The letter which Cahn did in fact prepare and which was admitted into evidence without objection, is further evidence that Cahn and Tellier understood that the substance of their telephone conversation was to to be communicated to Proctor and Jones. That letter recited the substance of what Cahn had told Tellier in the telephone conversation, *i.e.*, that certain statements made in the Series B offering circular had proven false, that Proctor proposed to use the proceeds of the new issuance for the same purposes as the Series B proceeds were to have been used for, and that on the basis of several additional factors Cahn had "some trouble understanding how we can hold out any basis for the public to invest in more debentures." The letter contained Cahn's ultimate conclusion, as he had previously informed Tellier, that the proposed issuance raised "very serious legal problems" and that neither he nor Tellier "should participate in any further debenture financing for the Company, at least under present circumstances."

The fact that the copies of this letter prepared for them may never have been sent by Tellier to Proctor and Jones is of no relevance. The fact that it was prepared demonstrates the understanding which Cahn and Tellier had as to the confidentialness of the prior telephone conversation. Nor do we attach any significance to the fact that Cahn's letter did not refer to the proposed issuance

as constituting a "Ponzi scheme," a phrase Cahn used in the telephone talk. That Cahn chose to couch his letter in more formal language than he used during his telephone conversation with Tellier does not indicate that some portion of the conversation was understood by the parties to be confidential, for the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content. Moreover, where, as here, information is given and it is agreed that it is to be transmitted to a third party, then not only the specific information, but the more detailed circumstances relating to it are subject to disclosure. *United States* v. *Shibley, supra.* Thus, assuming that Cahn's oral warning of a "Ponzi scheme" had not been intended to be communicated further, even then it was not a privileged communication. It was too closely connected with the information which was intended to be communicated to Proctor and Jones to be severed from the entire subject matter of which it was contemplated that Proctor and Jones were to be informed.

We conclude that the trial judge properly admitted Cahn's testimony concerning the telephone conversation between Tellier and him.

II

Tellier next assigns as error the admission into evidence of the books and records of ATC. These exhibits were admitted during the testimony of the Government's witness Casagrande who had prepared several schedules tracing the proceeds of the debenture sales. Counsel for Tellier objected to the Government's attempt to place these schedules in evidence on the ground that the books and records from which they had been taken were not in evidence. The Government's offer to place the underlying books and records in evidence was met with the objection that they had not been shown to have been kept in the regular course of business as required by 28 U. S. C. §1732. The

trial judge overruled the objection and admitted the books and records into evidence.

An examination of the record indicates that there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business. Nevertheless, they were admissible under the rule laid down by this court in *United States* v. *Feinberg*, 140 F. 2d 592, 596 (2 Cir. 1944), cert. denied, 322 U. S. 726, where we held that if the defendant has made representations concerning the financial condition of a corporation, the books of that corporation are competent as evidence against him in a mail fraud prosecution. In *Feinberg* the authenticity of the corporate books and records was foreclosed. In the present case, however, Tellier, while not questioning the authenticity of the books and records introduced into evidence as those of ATC, urges that authenticity has not been established by competent evidence. Hence, he contends, they were not admissible even under the *Feinberg* rule. Tellier's contention appears to be based upon the assumption that the authenticity of the records was for the court to determine and, consequently, that they were inadmissible until the Government had established authenticity by competent proof. This assumption is erroneous. The issue of authenticity was for the jury once a *prima facie* case had been made by the Government. 7 Wigmore on Evidence §2135 (3rd ed. 1940); Model Code of Evidence, Rule 601(a) (1942).

Consequently, we need only determine whether there was sufficient evidence of authenticity to make out a *prima facie* case for the genuineness of the documents. We have no hesitation in holding that there was. Some of the documents were identified by ATC's bookkeeper as being the records of the corporation. In addition, Casagrande's testimony was sufficient evidence from which the jury might have found that the books and records were authentic. Casagrande could not, of course, testify as to genuineness

as did ATC's bookkeeper, from first hand knowledge. He could and did, however, testify of his own knowledge that the books and records purported to be those of ATC, that they were records which as an accountant he was accustomed to seeing kept by a corporation, and that the books and records were found by him at the office of the corporation. Clearly, the testimony of ATC's bookkeeper and Casagrande was sufficient to sustain a finding of the authenticity of the books and records introduced by the Government. Consequently, the trial judge correctly ruled as to the admissibility of these documents.

III

The indictment charged Tellier and his co-defendants with having defrauded the purchasers of the Series A, B, C, and D debentures " * * * by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading * * * " At the trial evidence was proffered by the defendants bearing upon the financial condition of ATC during the years 1956 and 1957, after it was in the hands of a trustee in bankruptcy. This evidence was excluded by the trial judge on the grounds of irrelevancy, and these rulings are now urged by Tellier as constituting error requiring reversal.

We cannot agree. To begin with, the gist of the charges against the defendants was not, as Tellier suggests, that they falsely represented that ATC would eventually be prosperous. The tenor of the false representations charged were the statements and omissions concerning the current condition of the corporation. The falsity of these representations and the misleading effect of the omissions could not be altered by proof that ATC was operating at a profit at the time of trial, or that rate increases had been granted at some time after the defendants had relinquished control

to a trustee in bankruptcy. Similarly, Tellier's belief in the eventual prosperity of the corporation could not serve to lessen the culpability of his conduct. Even more important, however, is the fact that in November of 1955 ATC was placed in the hands of a trustee in bankruptcy, and, in reorganization, the corporation was operating under such radically altered conditions that it was in effect a different entity than that which it had been when the representations were made. It was not operating with the overwhelming burden of payments of debt-service which had so plagued it previously. No possible purpose could have been served by admitting evidence of the corporation's financial position during 1956 and 1957.

IV

The remaining issues raised by Tellier need not detain us long, for they are clearly without merit. On cross-examination by Tellier's counsel, a witness for the prosecution referred to memoranda which the witness had prepared. Tellier's counsel inquired whether these memoranda were available, to which the witness replied that they were. Tellier's counsel did not, however, request that the memoranda be made available to him. Under the circumstances, *Jencks* v. *United States*, 353 U.S. 657 (1957), now modified by 18 U. S. C. §3500, does not require reversal.

Nor is reversal required by the refusal of the trial judge to give the jury the following instruction Tellier requested.

> "While it is your duty to confer with your fellow jurors and discuss the evidence with them, your verdict must represent the real judgment and honest conclusion of each of you, and I charge you that each of you has the duty of arriving at your conclusions separately and that no one of you may surrender his earnest belief, if based upon the evidence, merely for the purpose of preventing a disagreement."

This charge, insofar as it informs the jury that "each of you has the duty of arriving at your conclusions separately," is not a correct statement of the law. As the Supreme Court indicated in *Allen* v. *United States*, 164 U. S. 492, 501 (1896), the jury's verdict is to be reached in concert. See also, *Papadakis* v. *United States*, 208 F. 2d 945 (9 Cir. 1953). An individual juror has a duty not only to confer with his fellow jurors and to discuss the evidence with them, but also to approach the jury deliberations with a willingness to recognize the validity of each juror's opinion. Tellier's requested instruction is erroneous because it fails to convey this latter point. It might well be interpreted by a juror as an invitation to adhere to his own approach to the case and merely to go through the form of listening to the views of his fellow jurors. In any event, even if the requested instruction had been unexceptionally phrased, we think that the propriety of charging it was within the discretion of the trial court. Although an instruction somewhat similar to that requested by Tellier has occasionally been given as part of the charge-in-chief, see, *e.g.*, the court's charge in *United States* v. *Reid*, 210 Fed. 486 at 494 (D. Del. 1913), and *United States* v. *Henney*, 90 Fed. 257 at 274 (D. Del. 1898), it would appear that it more customarily has been given as a supplemental charge after the jury has reported tentative disagreement and has been instructed that it is a jury's duty to reach a verdict if they are capable of conscientiously doing so.[4] Where, as here, there is an absence of circumstances indicating that such an instruction would be helpful to the jury, the decision of whether or not it should be given is within the discretion of the trial judge. We have no reason to doubt that he exercised that discretion wisely.

[4] See *Allen* v. *United States*, *supra*; *Orton* v. *United States*, 221 F. 2d 632 (4 Cir. 1955); *Wolin* v. *United States*, 211 F. 2d 770 (4 Cir. 1954); *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (2 Cir. 1949).

V

We turn next to the evidence bearing upon the guilt of the appellant Proctor. An examination of the record indicates that the evidence against him is clearly sufficient to sustain the verdict of guilty. Proctor's attack upon the evidence is two-pronged. He contends first that the evidence does not warrant a jury finding that the offering circulars mailed to purchasers of the debentures were misleading. He also urges that there is insufficient evidence to justify a jury finding that he participated in and had knowledge of the fraud that was perpetrated upon the public.

The first of Proctor's contentions is frivolous, as appears from even a cursory reading of the record. The material misstatements of fact in the circulars, as well as the failure to disclose material facts that should have been disclosed, were misrepresentations of precisely the kind it is the purpose of the fraud statutes to protect the public against. And there was adequate evidence from which the jury could find that Proctor's knowledge of and participation in the fraud were proven beyond a reasonable doubt. Proctor was one of the founders of ATC, and, together with the defendant Jones whom he brought into the corporation, he controlled it from 1951 until 1955 when the bankruptcy petition was filed. As secretary of the corporation, and later as its president, he was the main link in communication between ATC and Tellier during all times relevant to the issuance and sales of the Series B, C and D debentures. Whether or not Proctor was aware of the high pressure tactics employed by Tellier to sell the debentures,[5] the active role which Proctor played in the affairs of the corporation surely justified the jury in

[5] Since Tellier does not maintain that there was insufficient evidence to convict him, we have not dealt at any length in this opinion with his activities but have limited ourselves to discussing his claims of specific error.

believing that he was aware of the fraud perpetrated upon the purchasers of the debentures.

To be sure, Proctor never sold any of the debentures, and the jury was so charged. Nevertheless, his participation in the fraud was convincingly established. It was Proctor's representation that ATC had reached the break-even point and that it had made a profit in the last quarter of 1952 which paved the way for the issuance of the Series B debentures. In view of repeated and insistent warnings by Cahn about the necessity that ATC be operating at a profit before these additional debentures were sold to the public, it cannot be successfully maintained that Proctor was unaware of the materiality of this representation, or of the materiality of the similar representation which he made prior to the issuance of the Series C debentures. Proctor's active role in the fraud is further demonstrated by the letter which he sent out to all debenture holders on August 23, 1954 informing them that they could convert their holdings into stock at a "rather substantial premium." Proctor seeks to avoid the damaging effect of this letter on the ground that the record discloses that none of the recipients of this letter exercised their conversion rights. It was, however, permissible for the jury to find that the purpose of the letter was to pave the way for the sale of the Series D debentures which the public did buy. The reasonableness of this inference appears from the fact that Proctor's letter was written approximately two months after Tellier had written Proctor in June 1954, "Better start building those Bondholders *now* & every month from now on for the next issue," and arrangements for the "next issue," Series D, were initiated approximately two months after Proctor's letter was sent out.

We think it is unnecessary to recite the evidence against Proctor in further detail. The evidence which we have discussed and additional evidence in the record is wholly consistent with the jury's verdict that Proctor knowingly

participated in a scheme whereby the public was fraudulently induced to invest over $700,000 in the debentures of an insolvent corporation which at no time during its history operated at a profit.

VI

We conclude that the trial of the appellant Tellier was free of error and that there was sufficient evidence to sustain the verdicts against him and the appellant Proctor. The judgment below is affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I dissent and vote to reverse Tellier's conviction as I cannot agree with Judge Waterman's conclusion that Cahn's "Ponzi scheme" warning to Tellier was properly admitted on the ground that Cahn's advice to Tellier was not understood to be confidential.

On the contrary, from the tone and content of the letter which Cahn immediately afterwards wrote to Tellier, for the purpose of forwarding to Proctor and Jones, it seems to me that the parties understood that what would be disclosed to them would be couched in terms of what was inadvisable rather than what might be fraudulent and criminal. The occasion required plain speaking by Cahn and he spoke to Tellier in terms which would be clearly understood by one in the business of selling securities. When he said that further selling of bonds would "involve [Tellier] in a Ponzi scheme" he was in effect saying that if he did this he could go to jail as Ponzi did.

Such a blunt warning is precisely the kind of advice that an attorney should give to a client who hovers on the brink of questionable financial practices. But from the very nature of the occasion which requires such a warning, it is well understood that it is the kind of speaking which usually does not take place before third persons and which

is not intended for other ears or eyes. The majority opinion means that an attorney by his very act of warning a client against imprudent and unlawful action is placing himself in the position of principal witness against the client he seeks to aid. 8 Wigmore on Evidence §2291, p. 550 (3d Ed. 1940).

If in these circumstances the attorney can be made to disclose what he said, it follows an attorney will not dare to speak bluntly and forthrightly to his client and much good that may flow from the confidential nature of the relationship will be lost. *Cf.* 34 Neb. L. R. 538, 540 (1955).

Thus it seems to me that the reasoning of the majority sucks all the vitality and usefulness from the attorney-client privilege; it whittles the privilege to nothing and, worse still, it makes the attorney a witness against his client.

There is a great public interest in preserving this relationship and encouraging a frank exchange between attorney and client. In the overwhelming majority of cases the client follows the attorney's advice. Obviously frank expression of opinion, including such simile, metaphor and emphasis as seems appropriate, increases the likelihood that the attorney's advice will be heeded by the client. Any diminution of the protection which withdraws the veil of secrecy, where it is not crystal clear and explicit that both attorney and client understand that the very words of a private conversation are to be communicated to others, defeats the salutary purpose of the privilege.

Here it is abundantly clear that what was to be communicated to Proctor and Jones was to be a watered-down version couched in lawyer-like language. The letter did not say that issuing Series C debentures would be fraudulent and criminal; it merely pointed out that further issuance of similar debentures was highly inadvisable and unwarranted unless and until certain questions could be answered.

Cahn first related his telephone talk with Tellier on December 17 or 18, 1953. He advised Tellier not to become involved in the issue of a new series of bonds for the Alaska Telephone Corporation, since "* * * Alaska * * * is selling bonds to stay alive, to keep going as a substitute for earning money." Cahn said he warned Tellier in these words: "On that basis, if you sell bonds, you are merely selling additional bonds instead of having the company make money. And this selling of bonds to pay back interest by the sale of new bonds will involve you in a Ponzi scheme."

This forceful language is a far cry from the detailed lawyer-like letter which Cahn sent to Tellier, dated December 23, 1953, and which may be quoted in part as follows:

"Dear Walter:

This will acknowledge receipt from you of the letter from Bert Proctor of Alaska Telephone Corporation dated December 7th requesting assistance in the current emergency confronting the company.

* * * * * * *

In your accompanying note you indicate that you will be unable to sell any common stock and inquire whether the company can issue some more debentures, in the maximum principal amount of $150,000, to $200,000.

I am strongly of the opinion that it is unsound for this company to sell any more bonds.

The company has demonstrated no ability whatsoever to earn anything, and in fact has sustained a startingly [sic] consistent record of losses since its inception. Under the circumstances, *I think there are very serious legal problems as well as practical financial problems involved in selling any more debentures.*

* * * * * * *

In any event, I feel very strongly that neither of us should participate in any further debenture financ-

ing for the company, at least under present circumstances.

* * * * * *

In the event that you should write to Proctor and Jones, there are some questions which I think must be cleared up before we can even consider going ahead. As an example, I suggest that some of the following questions must be answered:"

(The letter then listed five matters which required explanation or reconciliation.)

* * * * * *

"Nothing that I say is intended as a reflection in any way on Jones, Proctor or the other officers. I know they have done all they can. This is a tough situation. *However, there is not enough in the picture to justify any further debenture sales.* As I stated above, I think this is the time for the company to raise private capital to take over its current difficulties. Public capital should await a demonstration of the company's earning power. *When I was in Seattle last March, I told Proctor and Jones that, in my opinion, no further public financing was possible under any circumstances unless and until the company demonstrated earning power. I still feel the same way.*

Best regards, sincerely."

(Emphasis added.)

While it may seem to be merely a matter of degree, the difference between the talk and the letter is the essence. It is the difference between a warning against felonious conduct and measures which would raise "very serious legal problems," *i.e.* responsibility measured by a jail term rather than by dollars.

Cahn's letter was to take Tellier "off the hook," *i.e.* to give lawyer's reasons why the debentures should not be issued; it was not intended to be and it was not a warning to desist because of possible criminal prosecution. But in any event it was not intended to convey and it did not

convey, the blunt prophetic language of the Cahn-Tellier telephone talk. Obviously it would serve no purpose, either of Tellier or Cahn, to pass along Cahn's colorful characterization of a further issue as a "Ponzi scheme." That he did not put "Ponzi scheme" or any intimation of possible criminal consequences in the letter seems to me to be conclusive proof of that.

The mere fact that some conclusions of the attorney-client exchange are to be conveyed to others is not an excuse or a reason for saying that the parties did not intend any part of the exchange to be confidential. Such reasoning is contrary to the facts of life and to the implicit nature of man-to-man speaking; it eats the heart out of the attorney-client relationship. The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all.

The majority opinion makes the further argument that even if Cahn's "Ponzi scheme" warning had not been intended to be communicated further, nevertheless it was not privileged because what Cahn said to Tellier "was too closely connected with the information which was intended to be communicated to Proctor and Jones" to be severed from that concerning which they were to be informed.

Few talks between attorney and client could ever survive such a test. How could it ever be said that the connection was not a close one? It makes no difference how close the connection might be, what is said privately should be protected unless the client clearly consents to further communication. See *Connecticut Mutual Life Insurance Co.* v. *Shields*, 18 F. R. D. 448, 451 (S. D. N. Y. 1955); New York Civil Practice Act §354; *People* v. *Patrick*, 182 N. Y. 131, 175 (1905); Richardson on Evidence §436 (8 Ed., Prince, 1955). Here, where a letter in writing followed the talk, that seems to me, absent further proof, to be confirmation that the client never intended or consented to

further communication of the talk, other than as contained in the letter, and that the attorney so understood it.

If the admission of the evidence was error, I think it follows that it was so harmful to Tellier's defense that his conviction should be reversed. Whatever doubts the jury may have entertained (the first trial had resulted in a hung jury), may well have been resolved by the "Ponzi scheme" talk. The fact that Tellier's own lawyer gave so unequivocal and memorable a warning of what Tellier would be doing if he persisted with more such financing on the basis of such representations as were made in view of the facts known to him can hardly be said to be merely cumulative even in so lengthy a trial with its abundant evidence to support the verdict. I would reverse Tellier's conviction.

APPENDIX B

JUDGMENTS BELOW

(1) Original Judgment

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges.

United States of America,
Appellee,

v.

Walter F. Tellier, Albert Joseph Proctor,
Defendants-Appellants

Elton B. Jones and
Alaska Telephone Corporation,
Defendants

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

(2) Judgment on Petition for Rehearing

[Title of Court omitted]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of May, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges.

[Title of Case omitted]

A petition for a rehearing with a request for a rehearing en banc having been filed herein by counsel for the appellant Walter F. Tellier,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX C

COLLOQUY REGARDING ADMISSIBILITY OF THE TESTIMONY OF THE GOVERNMENT WITNESS CAHN AGAINST HIS CLIENT, THE PETITIONER TELLIER.

[From pp. 344-360 of the minutes of testimony; see Appendix for Tellier and Proctor, p. 180a]

(The jury thereupon retired from the court room.)

The Court: Now, we have gotten this far, that the witness testified that after reading that letter, he telephoned to Mr. Tellier.

Mr. Windels: Yes, your Honor.

The Court: The question is, what did you say and what did he say?

Mr. Windels: Yes, your Honor.

The Court: That is what we are talking about.

Mr. Windels: Yes, it is.

The Court: That is objected to by Mr. Burke. Now, suppose we let Mr. Burke state his objection.

Mr. Burke: My objection is that this is a confidential communication between attorney and client, and the conversation that took place was of such a nature that it was obviously intended to be confidential, and is very damaging to the defendant Tellier.

The Court: Well, Mr. Burke, haven't we received testimony right along of the same character?

Mr. Burke: No, your Honor, and at the time the first conversation between Mr. Tellier and Mr. Cahn was [345] offered, before the Series A issue, I then respectfully directed your Honor's attention to the fact that I was not objecting to such conversation because in my view they did not contain anything that was intended to be of a confidential nature; but I did not wish my silence to be construed as a waiver when the time did arrive when I believed a confidential communication was to be offered. And in my view, everything that has been testified to in

the way of conversations between Mr. Tellier and Mr. Cahn up to this point was not of a nature intended to be confidential between them.

The conversation which is now about to be offered is entirely different in character from any of the previous conversations, and if I may say so, consists in substance of a statement by the witness to Mr. Tellier that to do any more financing for the Alaska Telephone Corporation would be a criminal fraud.

It is for that reason I say to your Honor that this conversation is entirely different from any previous conversation offered.

The Court: What do you say, Mr. Windels?

Mr. Windels: If your Honor please, at the [346] first trial this evidence was admitted and therefore I do not think it can be said that there is anything about it which is not known and a matter of public record. And I believe that the Federal Rule as to privilege is not a privilege against having someone appearing as a witness against him, but a privilege directed against the disclosure of confidential information. Once the information has been disclosed, it is not longer confidential; and I believe that constitutes a removal of the privilege, but more than that, your Honor, I have here two documents signed by Mr. Tellier, and given to agents of the Securities & Exchange Commission, at the time they were conducting their investigation into this matter.

The first one is dated October 10th, and written across the top, apparently in Mr. Tellier's handwriting, is: To whom it may concern: I hereby authorize and direct Bernard D. Cahn to make available his files and records to the Securities & Exchange Commission concerning transactions with Alaska Telephone Corporation and answer any questions that may be put to him concerning such transactions.

[347] And then in addition I have a letter on Mr. Tellier's letterhead dated October 10, 1955, addressed to

Bernard Cahn, Esq., 30 Broad Street, New York, N. Y.:

Dear Mr. Cahn:

I hereby authorize and direct you to make available to the Securities & Exchange Commission all files and records which you may have concerning transactions between Walter F. Tellier, and Tellier & Co., and Alaska Telephone Corporation, or any officer or director thereof. And to answer any questions that may be put to you by duly qualified representatives of the Securities & Exchange Commission concerning any such transactions.

Therefore the information is no longer confidential, your Honor. The privilege has been waived.

Mr. Burke: May I see those documents?

Mr. Windels: Surely.

Mr. Burke: In the first place, with respect to Mr. Windels' comment as to the testimony at the prior trial in this case, I should say I did object to this question, and the Court overruled my objection and admitted the testimony, in my view, erroneously.

[348] The publication of the testimony under such circumstances—it would be to remove the privilege by a bootstrap operation, if I can use Mr. Cahn's words; because the Court erred then to admit the privileged communication, it does not become not error now, because it was then admitted.

So far as these two documents are concerned, on Mr. Windels' statement, and by the language of them also, these were furnished to the Securities & Exchange Commission and authorized the Securities & Exchange Commission to get this information. They do not constitute a waiver for the purpose of what we are now confronted with of a criminal trial, or being introduced into evidence in court, by their terms.

In the second place, they are read into the record by Mr. Windels without any of the surrounding circumstances.

It is the defendant's contention that these documents were obtained from him by duress in the form of threats

at the time they were obtained, and they are for that reason therefore ineffective as waivers of the privilege also.

And in the third place, also, that such a waiver, [349] if it be a waiver, out of court, does not constitute a waiver that would make such testimony admissible offered at a criminal trial.

The Court: Now, to deal with one aspect of it, of what you just said, you say these are being read into the record. They are not being read into the record of the trial.

Mr. Burke: No, sir.

The Court: This is a record being made of an argument held in the absence of the jury.

Mr. Burke: By all means.

The Court: I should suppose that if the occasion should arise in the future for printing the trial record, this would not appear as part of it.

For ready reference, that might appear, perhaps, in the briefs of counsel. But I guess there would be an agreement at this time that what is now taking place is not part of the trial record.

Is that so?

Mr. Windels: I agree to that.

The Court: Now, that clarifies that point.

Now, as to the impact of the waiver, I should be inclined to go along with you. The waiver was [350] in its terms restricted to an investigation perhaps being conducted by the Securities & Exchange Commission. And I think the waiver would be restricted to its very obvious purpose. Therefore, I agree with you thus far.

It seems to me, however, that it is a mistake, Mr. Burke, if I may say so, without giving offense, for counsel to in one breath say I do not object to this testimony on the ground that it tends to violate the confidential privileges, but I am reserving for myself the right to make that assertion at some future time, and then permit testimony to go in which does not vary in its essence to that which is now sought to be adduced.

Do I make that clear to you?

Mr. Burke: I do understand what you Honor says.

The Court: Now, that being so, it seems to me that the Court is entitled to consult the record thus far made, and to find that the objection based upon the alleged violation of the confidential relation has not thus far been offered, not because it would not be appropriate, but because the evidence sought to be developed would not be harmful. That [351] is the point upon which counsel now relies. And I do not think that it is a sufficient reason for sustaining the objection.

Mr. Burke: Would your Honor permit me to reply briefly?

The Court: Surely.

Mr. Burke: Your Honor states in substance, as I understand it, that counsel's reason for not objecting hitherto was that the evidence was not damaging in effect, and that now counsel objects because he expects that the evidence will be damaging.

The Court: Absolutely.

Mr. Burke: And I say the reason that I have not hitherto objected, and I believe I have made it clear on the record, that is, at the beginning of this witness' testimony, is not that I did not consider the testimony damaging, but I did not consider that any of the conversations were intended by either Mr. Cahn or the client to be of a confidential nature.

And it is my understanding of the privilege that it only applies to conversations intended by the parties to be confidential in nature, and there-[352]fore my reason for not objecting, if I may respectfully say so, is not what your Honor said, but was because none of these conversations I considered to be of a confidential nature, or were intended to be so.

Your Honor says that they do not differ in essence from that which is now being offered. And I disagree with it, because it appears to me that there is a great

degree of difference between any facts heretofore taken, and the one now being offered, in that in none of the previous conversations did the witness Cahn say to his client: If you do so and so, you will be committing a crime. Whereas, now, this is in substance what the witness will testify to. And we are involved in a case where the defendant proceeded to do what the lawyer warned him against doing.

And perhaps it is the essence of the charge against him.

I say to your Honor that there is a very great difference between the previous conversations, which did not consist of such a dire warning, and with respect to the one that is being offered.

The Court: Mr. Burke, I would say it seems to [353] me it is a question of degree.

It seems to me that the advice thus far which Mr. Cahn gave to Mr. Tellier was of the same general character as that which is now sought to be adduced, and the fact that Mr. Cahn in his earlier advice did not use the extreme language that you anticipate that he will use in connection with this question, does not change the essential relationship of the parties.

Mr. Tellier was consulting Mr. Cahn, as his attorney, in connection with the public offering of these securities. Now, there is implicit in that that Mr. Cahn should assume a responsibility of pointing out what he regarded to be the requirements of the law.

Now, that is all that is involved in the answer to this question, the anticipated answer. It merely varies in the fact that you anticipate; that Mr. Cahn is going to call the law by name.

[354] I do not think that is an objection in principle.

Mr. Burke: Well, the previous conversations that bear any resemblance to this one, according to my recollection of the testimony, are of the following nature, that from time to time, Mr. Cahn says that he stated to Mr. Tellier that he thought in some instances that stock should be

sold instead of debentures; in other instances, that he thought a private syndicate should purchase stock, instead of any public sale of the stock, but in no case does the witness Cahn say to him that it is for any other reason other than financial judgment of Mr. Cahn.

In none of the previous conversations did he say anything even suggesting, in my view, to the client that it would be a violation of law for him to do so.

The Court: I could not have thought of suggesting that you had not been paying attention to the testimony. But your argument now suggests that is so.

On several occasions Mr. Cahn has pointed out that in his judgment it was necessary, in connection [355] with the public offering of these securities, that certain financial information should be accurately set forth. You heard that, didn't you?

That has nothing to do with the possibility of selling. It has to o with the purely legal aspects of the anticipated transaction.

I do not want to prolong our debate, and I would like you to believe, Mr. Burke, that I am seriously considering your objection, and in overruling it, I am not intending to treat it casually.

Do you want a recess for five minutes?

Mr. Burke: Yes.

Mr. Kole: May I then take up a matter in connection with that when we return?

The Court: Would you rather do that now?

Mr. Kole: It would just take a minute.

The nature of this testimony that is anticipated is so serious, that even if communicated between attorney and client, and even if the client should waive the privilege, I think clearly that that wouldn't be binding in any way upon Mr. Proctor, whom I represent, and my only concern is that if such testimony is admitted, it be under proper instruction from the Court to the Jury as to its [356] effect on the other defendant.

The Court: Mr. Kole, it will be admitted on the same theory that all testimony thus far in the case, which involved that which one defendant is said to have said or been told, is presented.

In other words, each defendant will have the right to move to strike in the absence of a conspiracy.

Mr. Kole: I make the point, your Honor, that this is just a bit different from the other situations, because in no sense, even if a conspiracy is said to have existed and definitely proved, could it be said that a confidential communication between an attorney and his client, advising the client of what the law is, constituted in any way an overt act.

The Court: I do not think it is offered on that theory. I think the materiality of the tetsimony would lie in the fact that one defendant was apprised that if he did a certain thing a certain legal result would ensue.

Now, if it be the fact that at that moment of time he was a member of the conspiracy, he then would have had the right to withdraw, or he would [357] also have had the right to notify his associates that there was a danger that had been pointed out to him.

I do not think that that is a good argument against the evidence.

Mr. Kole: Just this one last observation, your Honor. I would never make the point that if in fact that communication were also passed on and communicated by the client to the other alleged members of the conspiracy, that of course it be in every way relevant, but a confidential communication of that nature which in no way was communicated, is vital for this reason:

If it had been communicated then the other defendants, too, knowing of it, would have had an opportunity to withdraw from the conspiracy. That is the significance of it.

The Court: I shall be quite willing to tell the jury that in weighing this testimony they are not to visit the testimony upon either Jones or Proctor in the absence of,

evidence that either Jones or Proctor was apprised of the fact that this particular statement had been made by Cahn to Tellier.

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[359] Mr. Burke: So that I may be clear on this matter, your Honor, I understand that the whole argument since the jury withdrew from the court room is not part of the record.

The Court: It is not part of the trial record, that is correct.

Mr. Windels: Yes. Your Honor pointed out that if necessary this matter could be introduced in an appendix to any brief before the Circuit Court, or whatever court it would be.

[360] Mr. Burke: I just wanted the record to show that I did object upon the ground of privilege and that the objection was overruled.

The Court: Yes.

(Thereupon at 3:15 o'clock P. M., the jury returned to the court room.)

APPENDIX D

GOVERNMENT EXHIBIT 71

This consists of photostatic copies of the following items that purportedly are:

1. Ledger and journal in respect of 1952 (170 pages).
2. Adjusting journal entries in respect of the first three quarters of 1952 (22 pages).
3. Reconciliation of accounts payable in respect of the fourth quarter of 1952—worksheets (20 pages).
4. Ledger in respect of 1953 (101 pages).
5. Journal entries in respect of the fourth quarter of 1953—worksheets (4 pages).
6. Journal entries in respect of the first quarter of 1953; record of checks drawn April 1953; cash receipts record in respect of the second quarter of 1953 (19 pages).
7. Journal entries in respect of 1953 (21 pages).
8. Journal and ledger (part) in respect of 1954 with some worksheets (107 pages).
9. Journal entries in respect of the second quarter of 1954 (5 pages).
10. Journal entries in respect of the third quarter of 1954 (6 pages).
11. Journal entries in respect of the first quarter of 1954 (10 pages).
12. Journal entries in respect of the fourth quarter of 1954 (9 pages).
13. Detail of accounts payable at December 31, 1954—worksheet.

14. Ledger in respect of 1955 with entries to September 30 (94 pages).

15. Journal—cash book (part) in respect of 1955. (12 pages).

16. Journal entries in respect of the first quarter of 1955 (8 pages).

17. Journal entries in respect of the second quarter of 1955 (8 pages).

18. Three check stubs in May, 1953 on Colonial Trust Co. account.

19. Lybrand billing statement as of December 28, 1954.

20. Billing statements of Shattuck Agency in respect of May, June and July, 1953 and 4 duplicate vouchers on Colonial Trust Co. in payment thereof dated May 28th and June 30th, 1953.

21. Correspondence dated February, March and May, 1953 between A.T.C. by Jones and the Seattle Trust Co. and its attorneys concerning money owed, and 2 duplicate vouchers on Colonial Trust Co. in payment dated June and July, 1953.

22. Duplicate voucher on Colonial Trust Co. dated June 19, 1953, payable to Municipal Utilities.

23. Twenty-five duplicate vouchers on Colonial Trust Co. dated in May, June, July and August, 1953 payable to 20 different creditors together with bills from the creditors, correspondence demanding payment, and letters from the creditors' attorneys demanding payment (73 pages).

24. Exchange of telegrams between Jones and United States Attorney in Alaska, and correspondence from the U. S. Attorney and the War Department concerning a suit brought to collect money owed to the War

Department together with duplicate voucher on Colonial Trust Co. in payment thereof dated July 29, 1953.

25. Correspondence between A.T.C. and its Alaska attorney Mr. Arnall, and with the Behrends Bank together with a duplicate voucher dated August 31, 1953 paid to the bank to release an attachment.

26. Offer in compromise to the Bureau of Internal Revenue dated June 7, 1954 together with 2 duplicate vouchers in payment.

27. Eight duplicate vouchers payable to various creditors dated from April to July, 1954.

28. Six billing statements from the Automatic Electric Co. and 2 duplicate vouchers dated May, 1954 in payment.

29. Bills of the Automatic Electric Co. and the Northern Commercial Co. and 5 duplicate vouchers in payment dated from May to August, 1954.

30. Correspondence between Jones and a director, and between Jones and A.T.C.'s Alaska attorney concerning litigation over a mortgage at Nenana, and 3 duplicate vouchers dated June and July, 1954 in payment (9 pages).

31. Correspondence and exchange of telegrams between A.T.C. and the mortgagees at Petersburg and the mortgagees' attorneys, and duplicate voucher in payment (14 pages).

32. Bank statement of the National Bank of Commerce in respect of August and September 1954 with cancelled checks and deposit slips (13 pages).

33. A number of duplicate vouchers on Colonial Trust Co. together with bills and billing statements of creditors paid thereby, the checks bearing various dates from January to April, 1955.

34. Bank statement of the National Bank of Commerce in respect of March and April, 1955 with deposit slips and cancelled checks.

35. Bank statements of the Colonial Trust Co. from May 6, 1953 to April 18, 1955 (18 pages).

36. Balance sheet and profit and loss statement in respect of 1954.

37. Balance sheet and profit and loss statement in respect of the first quarter of 1954.

38. Balance sheet and profit and loss statement in respect of the first three quarters of 1954, and profit and loss statement in respect of the third quarter of 1954.

39. Balance sheet and profit and loss statement in respect of 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 128

WALTER F. TELLIER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. A1-A24, Vol. II, 158-182) [1] are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. A25-A26, Vol. II, 184) was rendered May 6, 1958. A petition for rehearing and rehearing en banc was denied

[1] References to Vol. I are to the printed appendix filed in the court below by petitioner. References to Vol. II are to the printed appendix filed by the Government below, supplemented by the proceedings in the court below. References to the unprinted transcript are prefaced by "Tr.".

on May 28, 1958 (Pet. A26; Vol. II, pp. 195-197). The petition for a writ of certiorari was filed June 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conversation between attorney and client is privileged when the parties intend to convey the information to others.

2. Whether, in a mail fraud prosecution, authenticated corporation books and records are admissible against any participant who made representations concerning the financial status of the corporation.

STATUTE AND RULE INVOLVED

Rule 26 of the Federal Rules of Criminal Procedure is as follows:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 1732(a) of Title 28, U. S. Code, as amended, is as follows:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or

event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of very kind.

STATEMENT

Petitioner was charged in 36 counts (Vol. I, 644-686) with violations of the mail fraud statute, 18 U.S.C. 1341; violations of the fraud section of the Securities Act of 1933, 15 U.S.C. 77q(a); and of conspiring to violate the above statutes under 18 U.S.C. 371. Elton B. Jones and Albert J. Proctor were co-defendants and the fourth co-defendant was the Alaska Telephone Corporation (referred to by its initials A. T. C.). They were indicted for causing the sale of A. T. C. debentures by means of untrue statements or omissions of material facts (Vol. I, 644-686).

Petitioner, Walter F. Tellier, was charged as a securities broker who operated under the firm name of Tellier & Co. (Vol. I, 646). Proctor and Jones were indicted as directors of A. T. C., which was engaged in acquiring, building, and operating small telephone systems in Alaska (Vol. I, 645). The trial resulted in a

verdict of guilty against petitioner on all counts (Vol. I, 3). Proctor and Jones were also found guilty (Vol. I, 3).

The petitioner was sentenced to four and one-half years imprisonment and fined $500 on each count (Vol. I, 3). Jones and Proctor were given suspended sentences (Vol. I, 3).[2]

The petitioner and Proctor appealed. The conviction of Proctor was unanimously affirmed; the conviction of petitioner was affirmed with one judge dissenting (Pet. A1-A24; Vol. II, 158-182). Proctor has not joined in Tellier's petition.

The following facts are pertinent to the issues presented:

In April 1951, the petitioner telephoned Bernard D. Cahn to discuss an offering of securities (Vol. I, 11, 14; Tr. 81). Cahn had been an attorney with the Securities and Exchange Commission (Vol. I, 8-9), and was considered an expert in the securities field (Tr. 536).

When Cahn arrived, he met some officials and the attorney for A. T. C. (Vol. I, 15). They discussed a proposed issue of debentures, not to exceed $300,000 (Vol. I, 21). By limiting the amount of the issue, they qualified under S. E. C. regulation A and could dispense with an elaborate prospectus (Vol. I, 23), three years of audited statements (Tr. 385), and expensive printing (Tr. 384) amounting to about $25,000 in total costs (Tr.

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[2] The corporate defendant, A. T. C., which was under a trustee in bankruptcy at the time of trial, was ordered not to appear in this criminal cause by the bankruptcy court (Vol. I, 2). The trial court considered the verdict against Jones and Proctor as a verdict against A. T. C., and imposed a nominal fine of $50 against the corporation on Count I and suspended sentence as to the remaining counts (Vol. I, 4).

385). Cahn was given a financial report prepared by the controller of A. T. C. (Vol. I, 30). Cahn and the A. T. C. attorney prepared the legal documents (Vol. I, 32) and the offering circular which offered $299,500 of Series A debentures (Gov. Ex. 1, Vol. I, 47, 33, 35, 637). Tellier signed an underwriting agreement which only obligated him to use his best efforts (Govt. Ex. 2, Vol. I, 34, 33). Cahn suggested the desirability of having audited balance sheets, but was advised there were no funds (Vol. I, 46).

Jones was President of A. T. C. in September when the Series A debentures were sold (Vol. I, 37, 46). In November of 1951, Lybrand, Ross Brothers and Montgomery, an accounting firm, was retained by A. T. C. (Vol. I, 46). Cahn went to Seattle around February 1, 1952 and at the board meeting discussed the financial condition of A. T. C. with the accounting firm (Vol. I, 57, 67). He was told that A. T. C. would show a loss of about $40,000 as compared to the statement furnished for the Series A offering circular, which showed net earnings (Vol. I, 30, 70). Cahn suggested that all who received debentures should receive a report showing the difference (Vol. I, 72). Cahn also told the board that no more public bond financing would be possible unless there were earnings, and suggested common stock (Vol. I, 72-73, 78). At this meeting, Cahn was elected to serve temporarily as a director (Vol. I, 67). In April 1952, Cahn attended another board meeting in Juneau, Alaska, and on returning told Tellier that A. T. C. should finance by selling stock privately (Vol. I, 85, 87).

When the audit was completed, it reflected losses for the four years ending December 31, 1951 (Govt.

Ex. 7, Vol. I, 81, 82). On June 16, 1952, Cahn resigned from the board of directors of A.T.C. (Vol. I, 91). Unable to obtain private financing, A.T.C. became delinquent in paying withholding taxes on its employees' wages, in remitting excise taxes collected from subscribers (Tr. 3415-3418), and in forwarding long distance tolls to Alaska Communications System (Tr. 239).

On December 9, 1952, Jones wrote Tellier reciting the need for funds, and Cahn suggested that Jones and Proctor come to New York (Vol. I, 94, 95). Proctor came in February 1953 (Vol. I, 105). Cahn stated he did not think A.T.C. could finance publicly until it showed a profit (Vol. I, 106). Proctor said that he believed the fourth quarter of 1952 would show a profit or that at least the break-even point had been reached. With this, Cahn told Proctor to prepare the offering (Vol. I, 107-108). Cahn subsequently learned of a default in the prepayment of interest to the indenture trustee (Vol. I, 111), and Jones told him they were paying this (Vol. I, 103).

Jones sent the proposed offering circular for Series B (Vol. I, 118). Cahn informed Tellier that it lacked the information which Cahn thought necessary (Vol. I, 119), and at Tellier's suggestion Cahn went to Seattle to obtain the data (Vol. I, 123, 127).

On April 1, 1953, Series B was offered (Govt. Ex. 19, Vol. I, 132) consisting of $150,000, 6%, 10-year convertible debentures. This offering (Govt. Ex. 19, Vol. I, 638) was for expansion, new equipment, and for working capital needed to continue operations. A later audit revealed that only $82.41 went into plant

and equipment and $8,957 to working capital (Govt. Ex. 26, Tr. 974, 979-980).

In May 1953, Jones wrote Cahn including a report showing a loss for the first quarter of 1953 (Govt. Ex. 25; Vol. I, 161-164). Cahn discussed this loss with Tellier and wrote Jones (Govt. Ex. 26; Vol. I, 164-165) expressing his concern that, while the offering circular stated they had reached the break-even point, the report indicated a $6,600 loss. He suggested that a copy of the statement should be sent to debenture holders "for legal as well as practical business reasons" (Tr. 320-322).

In the summer of 1953, Cahn saw the annual audit, which reflected that A.T.C. had lost $98,000 in 1952 (Govt. Ex. 27; Vol. I, 168-169). This report also noted the government tax liens (Vol. II, 43) which had not been indicated in the offering circular (Govt. Ex. 19; Vol. I, 638). On December 7, 1953, Proctor wrote Tellier (Govt. Ex. 28; Vol. I, 176-178; Vol. II, 53-56) enclosing a financial statement and stated they needed a short "breathing spell". Tellier referred it to Cahn (Vol. I, 175). When Cahn received the letter, he telephoned Tellier (Vol. I, 179). Over objection of counsel, Cahn testified that he told Tellier not to go ahead with any public offering as it would involve him in great trouble. Cahn said he would send Tellier a letter which he could forward to Proctor and Jones setting forth "why you can't sell any more bonds" (Vol. I, 181-182).[3] Cahn sent Tellier such a letter, explaining that bonds should not issue until they had demonstrated earning power; that there were very

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[3] This testimony is discussed in more detail in the Argument (*infra*, pp. 9-11).

serious legal problems in selling any more debentures (Vol. I, 185-189).

Early in January 1954, Tellier stated that something had to be done (Vol. I, 189), and Cahn told him that he would not represent him in any further financing (Vol. I, 190). Tellier proceeded to issue Series C in the face amount of $270,000, dated April 1, 1954 (Govt. Ex. 47; Vol. I, 641) for the same purposes as the previous series. No mention was made of government liens, or deposits necessary for interest payments. Proctor testified that none of the proceeds went for working capital (Tr. 3768). In 1953 A. T. C. lost $66,-681.18 (Govt. Ex. 73; Vol. II, 1).

Series D was issued December 1, 1954 in the face amount of $158,000 for the same purposes (Govt. Ex. 57; Vol. I, 643). No mention was made of government liens nor the required interest deposit. In 1954 A. T. C. lost $83,229.84 (Govt. Ex. 73; Vol. II, 1), and in the first six months of 1955 A. T. C. lost $52,678.87 (Govt. Ex. 73; Vol. II, 1).

In the autumn of 1955, A. T. C. filed under Chapter XI of the Bankruptcy Act (Vol. I, 518-519).

ARGUMENT

Petitioner tenders for review two evidentiary issues —the first relating to the attorney-client privilege, the second relating to the admissibility of certain corporate books. No constitutional question is involved. The first issue as stated by petitioner is not presented by this case; the second is of no general importance. The case basically turns on its particular facts and was correctly decided by the courts below. No conflict exists. In the circumstances, there is no occasion for further review.

1. a. Cahn, Tellier's former attorney, was allowed to testify to communications with Tellier, without any objection as to privilege, until asked to relate a telephone conversation in December 1953. Tellier had received a letter from Proctor (Govt. Ex. 28; Vol. II, 53-56; Vol. I, 175, 176-179), which enclosed a financial statement. Proctor stated in part, "As you will note there has been little, if any, improvement over the previous period." He indicated that the company was currently operating in the black, but needed funds for interest and wanted a "breathing spell." Tellier sent Proctor's letter to Cahn, appending the following note (Vol. II, 53): "Berney—See if we can put out more Bonds. WFT." After Cahn testified that he had telephoned Tellier, defense counsel objected that the conversation involved a confidential communication (Vol. I, 179, 180).

A colloquy then took place out of the presence of the jury (Pet. A27-A35). Government counsel argued that the privilege had been waived in that petitioner on two occasions had given agents of the S. E. C. documents authorizing Cahn to make available to the S. E. C. all his files and records concerning transactions between petitioner and the Alaska Telephone Company and to answer any questions concerning any such transactions (Pet. A28-A29). Petitioner's counsel took the position that the waiver extended only to the S. E. C. and not to the criminal trial, and that the documents were obtained by duress (Pet. A29-A30). The trial court agreed that the waiver was restricted to the S. E. C. investigation (Pet. A30). However, the trial court overruled the objection, noting that the advice to which Cahn had already testified was of the same general

character as "that which is now sought to be adduced, and the fact that Mr. Cahn in his earlier advice did not use the extreme language that you anticipate that he will use in connection with this question, does not change the essential relationship of the parties" (Pet. A32). The judge stated that counsel could not (Pet. A30) "in one breath say I do not object to this testimony on the ground that it tends to violate the confidential privileges, but I am reserving for myself the right to make that assertion at some future time, and then permit testimony to go in which does not vary in its essence to that which is now sought to be adduced." The judge also stated (Pet. A31) "that the objection based upon the alleged violation of the confidential relation has not thus far been offered, not because it would not be appropriate, but because the evidence sought to be developed would not be harmful." When defense counsel argued that Cahn in prior conversations had merely given financial advice, the court pointed out that this advice had nothing to do with the possibility of selling but with "the purely legal aspects of the transaction" (Pet. A33).

Cahn then testified that he told Tellier that to go ahead with any public offering would "involve you in great trouble" (Vol. I, 181). Cahn stated that selling bonds to pay interest "will involve you in a Ponzi scheme" (Vol. I, 182), and he would write Tellier a letter to be sent to Proctor and Jones, which would "set forth my legal conclusions as to why you can't sell any more bonds * * *" (Vol. I, 182). Cahn then wrote the intended letter (Govt. Ex. 29; Vol. I, 185-189), stating: "* * * Under the circumstances, I think there are very

serious legal problems as well as practical financial problems involved in selling any more debentures." On the same date, Tellier wrote Jones (Govt. Ex. 161; Vol. I, 364, 365; Vol. II, 62) that "Bernie Cahn does not believe that it would be possible for you to get a filing through the S. E. C. at this time. * * *"

In upholding the admissibilty of this evidence, the majority below relied on the ground that, "under the circumstances presented in the record, it is clear that this advice was not understood by either Cahn or Tellier to be confidential" (Pet. A11). It pointed out that petitioner expected a letter to be prepared to be forwarded to Proctor and Jones; that the letter did recite the substance of what Cahn told petitioner—the falsity of statements in the offering circular and the conclusion that proposed issuance raised "very serious legal problems." The fact that this was more formal language than Cahn's oral characterization of the plan as a "Ponzi scheme" was found by the majority not to indicate that some portion of the conversation was confidential since "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content" (Pet. A12).

b. It is evident from the foregoing that the question raised by petitioner is not presented by this case. Both courts below recognized the importance of the attorney-client privilege. The general principles are not in dispute. The privilege is one relating to private communications and does not extend to communications intended to be conveyed to third persons. *Wilcoxon* v. *United States,* 231 F. 2d 384 (C.A. 10), certiorari denied, 351

U.S. 943; *Himmelfarb* v. *United States,* 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860; VIII Wigmore, *Evidence* (3d ed.), Section 2311. It is equally well established that the privilege is one which the client may waive, not only expressly, but by implication. *Hunt* v. *Blackburn,* 128 U.S. 464, 470; Wigmore, *supra,* Section 2327. Hence, the only issue as to the privilege which this case presents is whether these established principles were properly applied to the particular circumstances presented by this record. We submit that they were and that the admissibility of the testimony may be upheld on either or both of the grounds relied upon by the courts below.[4]

On the totality of the picture presented by this record, the Court of Appeals was correct in concluding that Cahn's telephone conversation with petitioner was not considered confidential, either by the attorney or the client. The majority does not hold, as petitioner claims (Pet. 21), that a conversation between attorney and client, otherwise privileged, necessarily ceases to be protected when the conversation results in a communication to others concerning the same generalized subject matter. The majority holds that, "under the circumstances presented in the record, it is clear that this advice was not understood by either Cahn or Tellier to be confidential" (Pet. A11). While the majority does not at this point detail the background

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[4] Indeed, we believe that the district judge was more favorable to petitioner than was required in ruling that the formal written waivers of the privilege given to S. E. C. investigators were limited to that investigation and did not extend to the trial growing out of that investigation. Since, however, the district judge's concurrence with defense counsel on this aspect of the case had the effect of precluding any investigation into the claim of duress, we do not rely upon these formal waivers.

which it had previously set forth, the conversation at issue cannot be divorced from that background. The effect of the fact that the conversation was to be embodied in a letter to Proctor must be considered in relation to the other evidence in this case admitted without objection. This evidence disclosed that, as Cahn and petitioner well knew, Cahn had, after the issue of Series A, told the board of directors that no more public bond financing would be possible unless there were earnings (Vol I, 72-73); that, in connection with Series B, petitioner had sent Cahn to obtain necessary data (Vol. I, 123, 127); that, after discovering the loss for 1953, Cahn had discussed the loss with petitioner and written Jones (Vol. I, 164-165).[5] Against this background, a telephone conversation, which arose from the fact that petitioner sent Cahn a letter from Proctor, and which was to result in a letter setting forth Cahn's objections to further debentures for communication to Jones and Proctor, was properly found by the court below not to be deemed confidential by either side. And also, in the light of that background, the statement in the letter that the issuance would raise "very serious legal problems" could have been understood by all parties only as stating that such issuance would be illegal. While the language may not have been as colorful as the phrase "Ponzi scheme", the warning to all parties concerned was intended to be equally clear.

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[5] The background facts which form the basis for the advice did not even come from the client, but from audit reports, board meetings, and conversations with others. In fact, the lawyer was not kept fully informed, but had to learn of the existence of the government liens and nondeposit of prepaid interest from outside sources, to which the privilege naturally does not apply. *Hickman* v. *Taylor*, 329 U.S. 495, 508.

Moreover, we think the District Court was also correct in its holding that petitioner had already so fully waived the privilege that he could not endeavor to withdraw the waiver at the point at which he deemed it damaging. As Professor Wigmore states, VIII Wigmore, *Evidence* (3d ed.), Section 2327:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. * * *

Here, at the very opening of trial, petitioner's counsel said (Tr. 40-44):

> * * * Mr. Cahn was acting as Mr. Tellier's attorney in this whole matter * * *. Tellier turned the matter over to his lawyer, Mr. Cahn, to investigate for him and from that point on followed Cahn's advice during the issuance of the first two series of debentures, Series A and B. Series A being issued to the public in 1951 and Series B being sold in 1953, the evidence will show you that Cahn—not Mr. Tellier— but Cahn drew up these offering circulars or prospectuses which were sent to the persons who bought the debentures * * *.
>
> Now there is no question about it that it was the opinion of this lawyer, Cahn, that Mr. Tellier should do no more financing for them after Series B.

> However, you will see in the testimony here, that although that was Cahn's opinion, or he says it was, that there were a number of other lawyers involved in this picture besides Mr. Cahn. * * *

This statement itself effectively disposes of petitioner's argument (Pet. 22, n. 3) that each debenture series must be considered a separate retainer because Cahn was separately paid for each. It is evident, not only from this statement, but from the background testimony discussed above, that Cahn was petitioner's attorney throughout the transactions in issue up to the time that petitioner decided to disregard his advice. The evidence of prior dealings among the various parties to which we have referred in connection with the understanding that the telephone conversation was not to be confidential also supports the conclusion of the district judge that the advice which Mr. Cahn had already testified to without objection "was of the same general character as that which is now sought to be adduced, and the fact that Mr. Cahn in his earlier advice did not use the extreme language that you anticipate that he will use in connection with this question does not change the essential relationship of the parties" (Pet. A32).

2. a. Henry J. Casagrande was employed as an accountant by the New York State Department of Law in the Securities Bureau (Vol. I, 227-228). After obtaining permission from the trustee to see A. T. C. records, he went to the office and the bookkeeper made available to him the books from which he made photostatic copies (Vol. I, 229, 232). On the basis of the photostatic copies, he prepared schedules which were offered in evidence over objection by the defense (Vol.

I, 233-234). The Government also offered the photostatic copies as a foundation for the schedules (Govt. Ex. 71; Vol. I, 237), to which petitioner's counsel objected, since the books had not been identified as kept in the regular course of business in accord with 28 U. S. C. 1732(a) (Vol. I, 234).

The trial court ruled that the witness had testified that the exhibit purported to be the records and that sufficient foundation had been laid to receive them in evidence. It reserved to each defendant the right to move to strike any portion which was not as testified to (Vol. I, 236-237).

Mary Elizabeth Best was the accountant for A. T. C. (Vol. I, 470). She testified that a portion of Govt. Ex. 71 reflected the journal (Vol. I, 479). There was also identification by George Hall, who formerly was employed by A. T. C. as a C. P. A. (Tr. 2690-2693). No defendant denied their authenticity.

The court below found there was sufficient evidence of authenticity (Pet. A13, A14), even though there was insufficient evidence that they were kept in the ordinary course of business (Pet. A13). The court unanimously held they were admissible against Tellier under the rule of *United States* v. *Feinberg*, 140 F. 2d 592, 596 (C.A. 2), certiorari denied, 322 U.S. 726, which held that, if a defendant in a mail fraud case made representations concerning the financial condition of a corporation, the corporate books were competent evidence against him. (Pet. A13).

b. Petitioner does not challenge the rulings of the courts below that the documents were sufficiently authenticated as the documents of the corporation. He argues that, nevertheless, they were inadmissible under

28 U.S.C. 1732(a) because there was not sufficient evidence that they were kept in the regular course of business. As records of the corporation, however, the books were documents available to petitioner which he could have consulted before making representations with respect to the use to which the money from the bond issues would be put. As such, they were competent evidence, admissible for consideration by the jury, without regard to the truth of their contents. Hence they were properly deemed admissible, not under the business records rule, but generally as competent evidence. The business records rule was designed to permit the introduction of books as proof of the truth of their contents; it does not serve to preclude the admission of books that would be admissible on some other grounds. *Bruce* v. *McClure*, 220 F. 2d 330 (C.A. 5); *Taylor* v. *United States*, 96 F. 2d 16 (C.A. 5), certiorari denied, 305 U.S. 596; *Harrison* v. *Remington Paper Co.*, 140 Fed. 385 (C.A. 8), certiorari denied, 199 U.S. 607.

United States v. *Feinberg*, 140 F. 2d 592 (C.A. 2), certiorari denied, 322 U. S. 726, applied the above principles to one who was not directly connected with the corporation on the ground that he had vouchsafed for them by his participation in the submission of financial statements of the corporation. In this case, the evidence of petitioner's intimate relationship with the corporation even more clearly justifies the admissibility of the books. Petitioner apparently recognizes that Judge Hand's opinion in *Feinberg* is controlling here (Pet. 25-28), but argues that "*Feinberg* plainly misread the [Second Circuit] precedent on which it purported to rely" (Pet. 28) and hence was wrongly decided. *Feinberg*, we believe, is clearly correct, and in

any event review of the question is no more justified in this case than it was in *Feinberg* itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 128

WALTER F. TELLIER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Government's labored efforts to sustain the ruling below are so full of what Mr. Jefferson, in classic phrase, called "twistifications"[1] that this reply memorandum becomes not only appropriate but unavoidable.

First. The Government (Br. Op. 2) erroneously postulates the first question herein to be this: "Whether

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[1] Jefferson to Madison, May 25, 1810, quoted in 4 Beveridge, *The Life of John Marshall*, 105.

a conversation between attorney and client is privileged when the parties intend to convey the information to others." That Governmental language manifestly does not correctly or truly present the first question; instead, it only begs that question.

The true initial question presented herein is whether, when a written communication that is prepared for transmission to outsiders is sent partly in consequence of a privileged oral conversation between attorney and client, the dispatch of the written communication *ipso facto* destroys the privilege attaching to the oral conversation, which in every significant respect is watered down in, and different from, the subsequent writing. Otherwise stated, does a subsequent written communication that is sent to others after a privileged attorney-client conference rob the precise words of the antecedent oral conference of the privilege? The majority below declared that it did, Judge Lumbard held it did not.

The majority said (Pet. A12), "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content." Judge Lumbard, dissenting, expressed precisely the contrary view (Pet. A23): "The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

At the present juncture it would manifestly be inappropriate to argue at length the merits of those conflicting views. It now is sufficient merely to note that, *non constat* the Government's hopeful but unwarranted assertion (Br. Op. 8) that "The case basically turns on its particular facts," the question as reflected in the excerpts just quoted from the two opinions is plainly one of law, and an extremely important question of law at that.

If the majority's opinion stands, then no conference between attorney and client is ever protected by the seal of confidence if, in partial consequence of that conference, any communication of any kind—however different in content, purpose, and effect—is made for disclosure to others, be it a letter, a pleading, or even a brief. It was because of this inescapable and inevitable consequence of the majority opinion below that Judge Lumbard in dissent said, *inter alia,* (Pet. A20), "Thus it seems to me that the reasoning of the majority sucks all the vitality and usefulness from the attorney-client privilege; it whittles the privilege to nothing and, worse still, it makes the attorney a witness against his client."

And it is because of the corrosive and destructive impact of the ruling below on the aggregate of all attorney-client relationships everywhere and at all times that it should be reviewed here.

We have already pointed out (Pet. 22) that there was no waiver of attorney-client privilege involved here in anything done or omitted to be done by petitioner at the trial. But we think it well to add, because of the Government's attempt to resurrect the theory of such waiver on which the district judge relied (Br. Op. 14-15), that the latter's view failed to commend itself to any member of the Court of Appeals during the nearly five months that this case was under consideration there. In the present posture of the case, extended argument being necessarily precluded, we content ourselves with supplying some additional references in the margin in support of petitioner's position.[2]

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[2] The only "new" point made by the Government that is not already fully answered and anticipated by the matter in Pet. 22-23, note 3, is the contention (Br. Op. 14-15) that the opening

Second. The heart of petitioner's final point is that although 28 U.S.C. § 1732(a) authorizes the admissibility of business records only "if made in regular course of any business," the court below nevertheless upheld the admission of the ones here in question in the face of its own specific finding (Pet. A13) "that there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business." Thus the ruling below cuts out of the statute the very safeguards on which Congress expressly conditioned the admissibility of hearsay entries contained in books and records.

We confess ourselves utterly unable to understand the Government's novel and anomalous contention (Br. Op. 17) that the books were admissible "without regard to the truth of their contents," particularly since the Government itself is using them here as allegedly truthful.[3] Plainly, those books and records had no

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to the jury of petitioner's trial counsel (Tr. 40-44) disproves petitioner's position that each series of debentures was a separate transaction. Passing the obvious point that an opening statement to a jury has no evidentiary or probative value (e.g., *United States* v. *Tomaiolo*, 249 F. 2d 683 689 (C. A. 2)), the fact is that petitioner's position is fully supported by, e.g., the testimony of the Government's own principal witness Cahn (12a-13a):

> "The Court: Was that while you were acting as attorney in connection with this Alaska Telephone matter or was it later?
> "The Witness: It was while I was acting as counsel for Mr. Tellier in connection with the Alaska Telephone Corporation matters, plural, because there were more than one, * * *."

[3] See Br. Op. 6-7: "A later audit revealed that only $82.41 went into plant and equipment and $8,957 to working capital (Govt. Ex. 26, Tr. 974, 979-980)." In this connection, "26" is a misprint for "76"; Govt. Ex. 26 was a letter from Cahn to Jones (165a-166a), Govt. Ex. 76 was one of the schedules prepared by Casagrande which was specifically objected to by petitioner (252a-256a) because it was improperly based on Govt. Ex. 71, the books and records now in question.

evidentiary value—or even quality of admissibility—except on the footing that what was found therein reflected truth.

Finally, but clearly not least, the Government relies on *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726, saying (Br. Op. 17-18), "*Feinberg*, we believe, is clearly correct, and in any event review of the question is no more justified in this case than it was in *Feinberg* itself." We have already discussed *Feinberg* at length (Pet. 25-27). Here it is only necessary to add this:

Examination of the petition for certiorari in that case (No. 757, Oct. T. 1943) discloses that it did not mention any conflict with other circuits such as the present petitioner invokes here; that it did not point out the palpable misreading of prior decisions which the *Feinberg* opinion involves; that it hardly mentioned the basic question of a disregard of the regular entry statute, now 28 U.S.C. § 1732(a); and that it did not, of course, dwell on, because it could not, the frank admission and finding of the court below in this case that the terms of that statute had not been met.

Thus the issues now squarely presented were not before this Court in *Feinberg*—and of course it should hardly be necessary to add that, even if they had been, denial of review there would not have imported any judgment on their merits.

Third. On both questions presented by the petition, therefore, each ruling below is not only contrary to public policy, but is one that is bound to unsettle vitally important areas of federal law.

Consequently, it is respectfully submitted that, for the additional reasons set forth above, the present petition for certiorari should be granted.

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